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PROPOSED GROVE CITY LEGISLATION, RELIGIOUS LIBERTY, AND PRIVATE EDUCATION

HEARINGS

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

EXAMINING THE SUPREME COURT'S DECISION IN GROVE CITY v. BELL, RELATING TO EDUCATIONAL DISCRIMINATION ON ACCOUNT OF SEX, RESTRICTED ITS COVERAGE TO THE PROGRAM OR ACTIVITY RECEIVING FEDERAL ASSISTANCE UNDER TITLE IX, FOCUSING ON S. 272 AND S. 431

JULY 17 AND SEPTEMBER 20, 1985

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PROPOSED GROVE CITY LEGISLATION, RELIGIOUS LIBERTY, AND PRIVATE EDUCATION

WEDNESDAY, JULY 17, 1985

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 10:13 a.m., in room SD-430, Dirksen Senate Office Building, Senator Orrin Hatch (chairman) presiding.

Present: Senators Hatch, Stafford, Grassley, Metzenbaum, Kennedy, Dodd, Simon, Kerry, Pell, and Nickles.

The CHAIRMAN. We will proceed with the hearing on proposed *Grove City College* legislation and religious liberty.

Senator KENNEDY. I want to indicate, Mr. Chairman, at the outset that I hope to get back. We are having a markup of the defense authorization bill, which will take my attendance for a period of time, but I look forward to reading the comments in the record of our witnesses here this morning.

The CHAIRMAN. We understand, Senator Kennedy, and we appreciate the conflicts that we all so often have.

We will take just 1 minute to set up for the hearing. We will recess for 1 minute.

[Short recess.]

OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. Ladies and gentlemen, this marks the first day of hearings during the 99th Congress on proposed legislation to overturn the Supreme Court's 1984 decision in *Grove City College* v. *Bell.* Such legislation, of course, remains unfinished business from the 98th Congress in which similar legislation foundered in the Senate as a result of controversy over the proper scope of Federal regulatory jurisdiction. Two measures have been introduced in response to the *Grove City College* case: S. 272, introduced by Senator Dole and myself, and S. 431, introduced by the distinguished ranking member of this committee, Senator Kennedy, and Senator Weicker. Both measures would fully overturn the Court's holding in *Grove City College* that title IX, relating to discrimination on account of sex in institutions of higher education, was restricted in its coverage to the program or activity receiving Federal assistance and apply it to the entire institution. While S. 272 would similarly amend other civil rights laws preventing discrimination on the grounds of race, handicap, and age and apply them to an entire higher educational institution, the proposal of Senator Kennedy would additionally amend and apply those three other civil rights statutes broadly to many institutions and aspects of American society and State and local government.

Today's hearing will focus upon a critical, yet generally neglected, aspect of the *Grove City* controversy—its impact upon the exercise of first amendment religious freedoms. It obviously would be ironic if in the context of legislation designated as "civil rights" legislation we were to diminish the exercise of some of the most fundamental civil rights of the American people. While subsequent hearings will focus upon issues already raised during the 98th Congress by critics of previously proposed *Grove City* legislation—its impact, for example, upon State and local governments, small businesses, farmers, and so forth—today's hearings will concentrate upon the religious liberty implications of the proposed legislation. In other words, we intend to explore the full civil rights impact of the civil rights measure before us.

At the outset, let me state my own view that we ought to limit ourselves in the consideration of the implications of proposed *Grove City* legislation to germane areas of controversy. It is not my intent to use a *Grove City* bill as a vehicle for the passage of nongermane matters. Let me now briefly summarize what I view as the principal germane areas of controversy relating to S. 272 and S. 431 in the area of religious liberty.

RELIGIOUS LIBERTY ISSUES

First, religious exemption. Title IX at present contains an extremely narrow exemption for those schools controlled by a church whose policies in such areas as curriculum, counseling, discipline, dress codes, and residence conflict with the requirements of title IX. Given the sharply expanded scope of coverage in the proposed legislation, this committee must address the issue of whether to modify the existing religious exemption. In other words, should title IX incorporate a conscience clause which allows any school, motivated by a religious mission, whether or not formally controlled by a church, to adhere to particular policies even if they conflict with title IX rules or regulations?

Second, abortion. In particular, the issue of religious conflict has been raised in the context of abortion policy. Title IX rules and regulations prohibit covered schools from treating abortion any differently from any other medical procedure for such purposes as, for example, student health clinic assistance, and employee health, and leave policies. The proposed *Grove City* legislation would not merely ratify these regulations as proper expressions of congressional intent but also would impose them far more broadly upon educational institutions generally. Again, this committee will have to explore the merits of language directed toward the abortion regulations contained in title IX.

Third, scope of coverage. A third issue relates to the extent to which Federal financial assistance to an institution triggers Federal regulatory coverage of related or subordinate religious institutions. For example, under S. 431, does participation in a Federal program by a Catholic diocese automatically result in coverage of each of its component parishes? What is the reach of the Federal regulatory net in such areas and what is the net reach of funding termination authority in such areas? Again, these are matters the committee will have to address.

Fourth, campus organizations. Another religious liberty issue relates to the extent to which Federal assistance to an educational institution serves to limit the diversity of religious organizations which may use campus facilities and secure campus sanction. The Knights of Columbus, for example, has expressed concerns that its male-only policy might prevent its several hundred campus chapters from equally legitimate status under title IX, thus requiring schools receiving Federal moneys either to expel them from campus or else lose funding. Other campus religious groups might face similar difficulties.

Fifth, tax exemptions. Given the extremely broad definition in last year's House report of what constitutes Federal financial assistance, as well as recurring litigation in the area, the question has been raised whether a religious institution receiving tax-exempt status would thereby be receiving such Federal assistance. If so, these organizations would be required to abide by countless pages of Federal rules and regulations and be otherwise subject to the requirements of title IX. Does tax-exempt status constitute Federal assistance under the proposed acts? Do other services rendered such institutions by the Federal Government constitute Federal financial assistance?

Sixth, establishment clause. If Federal scholarship assistance to a student attending a religious school is considered Federal aid to that school, as decided by section 1 of the *Grove City College* decision, is such assistance permissible under the establishment clause of the first amendment? That is, the implications of the *Grove City College* case in light of the restrictions of the first amendment need to be explored by this committee.

Seventh, school systems. The proposed *Grove City* legislation in S. 431 includes within its coverage public schools or other school systems. There seems to be no other interpretation of this provision than that it seeks to cover private and parochial school systems as well. This would be new coverage of civil rights laws. If one parochial school within a diocesan structure participates in the school lunch program, is every other school within that structure subject to the full weight of Federal regulation?

Eighth, noneducational institutions. The proposed legislation of S. 431 also seems to impose institution-wide coverage under title IX to noneducational institutions which incidentally carry on educational functions, such as a teaching hospital. If that is a correct analysis, this committee must again deal with the religious exemption provision in order to ensure that its coverage is concomitantly enlarged. Just as a religiously oriented school should be protected in the exercise of conscience, the same should be true for hospitals associated with a religious order.

Ladies and gentlemen, I have gone on in this opening statement at greater length than I normally do, but I have wanted to summarize generally the aspects of the religious liberty issue before us today. As we consider these issues, I hope that members of this committee can work together to ensure that no civil rights bill approved by this committee inadvertently serves to undermine genuine civil rights.

I look forward to the testimony of each of our witnesses this morning and welcome you to the committee. Thank you very much for taking the time to be with us today.

Now we will turn to Senator Metzenbaum.

Senator **Metzenbaum**. Mr. Chairman, undoubtedly this bill is one of the most important, and maybe one of the most controversial, pending in Congress. I am frank to say that it is good that at last there is a hearing, but I am disappointed that this hearing only pertains to one small issue raised by the bill.

I am hopeful that the chairman will quickly schedule a hearing on the principle issues raised by the bill or, better still, schedule a markup in the committee so we can report the bill to the Senate. I doubt very much that many minds are being changed by the testimony we will hear today or any future hearings, because we all have pretty definite views with respect to this subject.

Now, if there are certain matters that need to be resolved in order to make it clear that the bill is not applicable to certain situations, that can be done, but that does not take a lot of work. It is possible to spell out specifically as the Edwards amendment, for example, in the House does, that it does not have any impact upon certain issues.

Now, the witnesses today will focus on religious issues. The fact is that is largely a distraction to the basic issue involved in this legislation. This bill does not interfere with anyone's religious convictions, nor would I nor any other Member of the Senate or the House want to. It deals with one clear and overriding issue, whether we should restore the scope of the ban on discrimination in our civil rights laws to the status that was in effect before the Supreme Court's *Grove City* decision.

That decision, which fundamentally misinterpreted congressional intent, said that an institution receiving Federal funds could continue to discriminate in one department as long as funds were provided to another department. Federal funds could support the science department but the university could discriminate against women in the athletics program or the business school.

That is the problem we are trying to solve, not just for sex discrimination in educational institutions, but for discrimination against minorities, the aged and the handicapped in any agency or institution or other organization receiving Federal funds.

Some have argued that this bill somehow promotes abortion. Although I do not doubt the sincerity of many who are concerned about this, the fact is that the bill does nothing of the kind. It says nothing about abortion or about existing regulations regarding abortion. It simply does not address the issue at all.

But I am frank to say that we have much legislation around here in which suddenly out of nowhere the abortion issue becomes the preeminent and most controversial issue. I do not care whether it has to do with the Department of Defense appropriations bill or an SBA bill or some other bill having to do with some wholly, unrelated subject, somehow there always seems to be an opportunity to provide some antiabortion amendment as an addition to that particular piece of legislation.

And without having checked the facts, I would guess that the Congress, if you took any one subject, has spent more hours on the issue of abortion than almost any other single subject.

The dispute that we have before us today boils down to whether we are going to return the law to its status before the *Grove City* decision or whether this bill will be used to try to accomplish other objectives. I sincerely hope the Congress will not lose sight of the essential task of passing this bill and that we will not get sidetracked into a debate about abortion or any other issue.

Now, the chairman has made a very erudite statement with respect to a number of issues that he feels are relevant in discussing this particular bill. Mr. Chairman, with your leave, I would like such time as I need in order to include an appropriate response to the opening statement.

The CHAIRMAN. Without objection, we will be happy to give you that time.

Senator Stafford, who is the distinguished chairman of the Education Subcommittee is next. Senator Stafford, do you have an opening statement?

Senator STAFFORD. Thank you, Mr. Chairman. I will not make an opening statement. I look forward to hearing the witnesses today. I congratulate you, Mr. Chairman, on establishing this hearing on this important issue. I trust there will be additional hearings so that we can explore this matter fully, and I share many of the views, I must say, that have been expressed by Senator Metzenbaum.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Dodd.

Senator DODD. Thank you, Mr. Chairman. I have an opening statement and I will just ask unanimous consent that it be included in the record at this point.

Mr. Chairman, let me just mention very briefly that my hope would be as well that we would be able to move as expeditiously as possible. I do not mean to such a degree that we do not have an opportunity to examine these issues——

The CHAIRMAN. We do need to examine all the issues.

Senator DODD [continuing]. But this issue, the Guaranteed Student Loan or Student Assistance Programs and this issue I think are two of the most pressing issues that we face in the entire arena of education in this committee, and we are now going to face the August recess and be back in September with all of the other issues before us, the budget, possible tax reform legislation, it is going to become a very crowded calendar very, very quickly. And we all know the difficulties if we lose the opportunity this year and get into next year, we could very well miss an entire Congress without coming to terms with this particular problem.

I think there is probably a lot more that we can agree on than we are probably focusing our attention on, so I would echo the comments of Senator Metzenbaum and Senator Stafford that we move as quickly as we can and try to get to the hearings which broaden the larger questions that obviously have to be addressed. I don't minimize this question. The House has already gone through a very thorny process with two committees taking a different position on, so we have got our work cut out for us, but I would hope we would move as quickly as possible on this and not lose the opportunity in this Congress of resolving this issue.

The **Chairman**. Thank you, Senator. With regard to that point, I might mention that we had intended to wait until the House acted because we believed we should not move until then. However, we are now moving before the House has completed action and we intend to examine all of the difficult issues here. We will try to do it expeditiously and I am dedicated to having the *Grove City* case overruled and to apply title IX institutionwide in schools of higher education. I think we could do that in 5 seconds on the floors of both Houses of Congress.

Unfortunately, the language in S. 431 has to be examined and also in the two versions of the House bill as it emerged from committees. We must look carefully at those bills. We will try to do it expeditiously. We are trying to work out future hearing dates with the ranking minority member and to establish a reasonable period of time at the end of which the committee will act one way or the other on this proposed legislation.

The **Chairman**. Senator Grassley.

Senator **Grassley**. Mr. Chairman, I appreciate the opportunity to hear testimony from these distinguished witnesses this morning on legislation aimed at overturning the *Grove City* v. *Bell* decision. Those of us who were similarly involved last year look forward to the chance to examine new language that has been introduced in the 99th Congress to restore pre-*Grove City* coverage under title IX.

Last year, I introduced a narrowly drawn, straightforward measure, S. 2884, which would have accomplished the intent of reversing the *Grove City* case without the scope of coverage ambiguities that plagued deliberations on this issue during the last Congress. Under that bill, there would have been no question as to whether or not American farmers would have been covered by the Rehabilitation and Age Discrimination Acts if, for instance, they received crop subsidies. There would have been no debate as to whether the acceptance of food stamps would trigger civil rights coverage of mom-and-pop grocery store owners.

Yet there were those in this body that wanted to go further than simple restoration language to expand the Federal regulatory jurisdiction. Frankly, I think a good case can be made to amend title IV of the Civil Rights Act, section 504 of the Rehabilitation Act, and the Age Discrimination Act in addition to title IX, to avoid the undesirable impact of the *Grove City* decision.

Therefore, I have joined Senator Dole as a cosponsor of S. 272, a bill which would apply coverage of all four civil rights statutes to the entire educational institution receiving Federal funds, rather than the specific education program or activity receiving Federal financial assistance.

Proponents of last year's broader legislation have introduced a new bill as well, which is S. 431. I am pleased that the chairman is committed to a series of hearings on the *Grove City* issue that can fully address the concerns that many affected groups may have with these two bills.

Today we start this hearing series by examining the impact of the *Grove City* legislation on the issue of religious liberty and freedom expressed in the first amendment. A number of religious organizations have expressed their concern that expansion is needed in section 901 of title IX which allows recipients controlled by a religious organization relief from complying with title IX regulations if they are not consistent with the religious tenets of those organizations.

It has been suggested that this narrow exception should be broadened to insure that educational institutions, hospitals, or other title IX recipients that are affiliated with a religious organization be exempted from regulations they find morally repugnant, such as the provision of abortion services.

Surely, the religious tenet exemption must be reviewed to determine if it is appropriate to protect the growing number of church-affiliated institutions that may find title IX regulations at odds with their religious beliefs.

Another concern identified during the House consideration of *Grove City* legislation is the existing title IX regulations that provide that all pregnancy-related medical procedures, such as abortion, be treated as any other medical procedure by recipients of Federal funds. These regulations specifically require that any educational institution, hospital, or other title IX recipient provide coverage for abortion services for its students or employees if the recipient provides other health services.

Perhaps the Senate should consider similar abortion-neutral language considered in the House that would insure that nothing in this legislation would grant or deny any right relating to abortion or the provisions of abortion services.

Of course, these are only a few of the religious freedom issues that are raised by *Grove City* legislation. I welcome the hearing today to discuss in more detail the need to maintain our religious freedoms as we seek to provide civil rights protection under our Federal laws.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Simon, you are next. Senator Simon played an active role in the House in its consideration of these measures last year and I am certain he will play an active role in the Senate as well.

Senator SIMON. Thank you, Mr. Chairman. I concur with those who say let us move, move quickly. I was pleased with the Chair's statement that we want to move expeditiously on this.

What we want to do is to move toward that status that we had before the *Grove City* decision and I think anything that we do to reflect other views any of us may have really is a disservice to the American public.

The bill that we passed in the House last year I think did that, passed 375 to 32. The sentiment is overwhelming in this body to move in that direction. So I hope we can move and move quickly and come up with a solid document.

The CHAIRMAN. Thank you, Senator.

Senator Kerry, we will turn to you.

Senator KERRY. Mr. Chairman, I would like to ask unanimous consent that my comments, my opening comments may be printed in the record.

The CHAIRMAN. Without objection, it is so ordered.

Senator KERRY. I would also like to put in the record a list of the religious organizations and affiliations which support the act, while at the same time expressing my concern that the thrust of the effort to reverse *Grove City* and indeed the thrust of the Civil Rights Act is really civil rights and not so much I think religion, and I express my concern that we may be interjecting some thoughts and possibly measures into the act that were not originally intended.

Having stated that, however, I would like to simply say for the record that I am mindful of the fact that some $13 million goes to educational institutions in this country and only 4 percent of that is directed toward specific programs I think it is clear that we are leaving out protection every day we do not reverse the *Grove City* decision and a vast majority of those people are subjected to whatever kind of discrimination that exists.

I know in Massachusetts, in Boston, we pride ourselves on our many educational institutions. One of them recently was the subject of a harassment complaint, was not investigated simply because the building in which it allegedly took place was not rehabilitated or built by Federal funds and ironically had that building simply some linkage to the current situation with Federal funds, that act would have been investigated. I think we simply cannot allow that kind of opportunity for harassment and the violation of rights to occur.

So I urge us to take action soon and hope that hearings in the future will focus perhaps more directly on what I think was the original intent in coverage of the act.

Thank you.

[The prepared statement of Senator Kerry follows:]

PREPARED STATEMENT OF SENATOR JOHN F. KERRY

Senator KERRY. Mr. Chairman. Thank you for calling this hearing today. When Congress passed Title VI of the Civil Rights Act in 1964, it was called the most far-reaching legislation of its time. Title VI attached the inequities that denied access and opportunity to millions of Americans. Congress extended its protection further to others suffering discrimination and enacted legislation that supported the civil rights of women, disabled persons and older Americans. The Civil Rights Act and the subsequent civil rights statutes were fundamental steps in our country's progress towards an equitable society.

In February of last year, however, the Supreme Court's decision in *Grove City College* v. *Bell* significantly undermined the intergrity and force of this Nation's civil rights statutes. The Supreme Court interpreted the "program or activity clause" of Title IX of the Education Amendments of 1972 "narrowly", rejecting the commonly accepted institution-wide definition used for many years under Democratic and Republican Administrations alike. Discrimination is not only illegal, it is amoral. The federal government has a responsibility and an obligation to put conditions on the receipt of federal funds in order to protect its citizens. This Committee must take action to reverse the course set by *Grove City* and I feel the Civil Rights Restoration Act of 1985, discussed here today, is our most effective vehicle.

The scope of *Grove City* extends beyond gender discrimination in education. It is indicative of this Administration's retreat from support of the protection and enforcement of civil rights. The Assistant Attorney General declared that the Justice Department would interpret the *Grove City* holding in the broadest context possible and apply it to Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. As a result of the *Grove City* decision, women taxpayers, minority taxpayers, disabled taxpayers and senior citizen taxpayers are contributing to a government that passes funds to institutions that, in turn, are free to discriminate against them.

The implications of *Grove City* are both frightening and dangerous for a nation in pursuit of a just and more equitable society. *Grove City* has restricted our ability as legislators to protect each citizen's constitutionally guaranteed rights. Only four percent of the over $13 billion in federal assistance to educational institutions is earmarked for specific programs within colleges and universities. This leaves the majority of students vulnerable to discrimination throughout their college tenure. The Department of Education has tabled seventy-eight discrimination cases, simply because institutions are using *Grove City* as a defense against federal action. In my home state of Massachusetts, at a university in Boston, a sexual harassment complaint has not been investigated because the building, in which the act allegedly occurred, was not built or renovated by federal funds. Ironically, if the sexual harassment had taken place in a facility linked to federal monies, federal action would have followed the complaint. This incident, unfortunately, is representative of the paralysis that has come over the government in its effort to support the civil rights of all its citizens.

The Civil Rights Restoration Act of 1985, a bipartisan measure, is designed to *restore* the four anti-discrimination statutes to the broad scope and coverage originally intended by Congress. It redefines "program or activity" to cover a recipient institution in its entirety. This assures that revenue collected from a diverse population will be used to benefit an equally integrated citizenry. The issue is civil rights and the discriminatory practices of publicly financed institutions, not abortion or religious freedom. Amendments that seek to expand Title IX provisions beyond their pre-*Grove City* status are outside the scope and intention of the Act. Entities will be subject to the same coverage existing prior to *Grove City*—nothing more, nothing less.

The strings attached to federal financial assistance should not be loosely tied to our anti-discrimination laws. The federal government cannot condone discrimination if it is committed to the integration and equal opportunity of all its citizens. The Civil Rights Restoration Act of 1985 is evidence that the Congress will not abdicate its responsibility to uphold this Nation's civil rights statutes.

The CHAIRMAN. I appreciate your comments, Senator, but let us all recognize that this is a very important issue. We will focus on all the complex issues that are involved as we hold these hearings, and we will try to expedite the hearings. But we are going to air this matter fully, which is something I believe was not done last year in any committee of the Senate or House. So this year we will give full consideration.

I should add that the House this year did hold extensive hearings. Perhaps that is why they are in the quandary they are in today because they found that there are, indeed, some extremely important, legitimate points that have been raised by some critics of the proposed legislation they have considered in committee.

I think virtually everybody agrees that we should resolve the *Grove City* problem, overrule that case, and apply title IX institutionwide. So we will proceed, we will hold a series of hearings that, I hope, will cover all the issues. That is in the best interests of the legislative process.

We will turn to Father Hehir at this time. Father Bryan J. Hehir represents the U.S. Catholic Conference. Father Hehir is secretary of the Department of Social Development and World Peace of the conference, as well as resident professor of ethics and international relations at Georgetown University. He also is the author of a number of articles on religious liberty.

Father, we are very grateful to have you here today. We look forward to hearing your testimony.

We will put the full statements of all witnesses into the record as though they were delivered, but we would like to limit the witnesses to statements of 10 minutes each so that we can have enough time for questions from the members of the committee. Thus, we will interrupt our witnesses at the end of 10 minutes.

Father, we will turn to you now.

STATEMENT OF FATHER BRYAN HEHIR, SECRETARY, DEPARTMENT OF SOCIAL DEVELOPMENT AND WORLD PEACE, U.S. CATHOLIC CONFERENCE

Father HEHIR. Thank you, Mr. Chairman and members of the committee.

On behalf of the Catholic bishops of the United States represented by the U.S. Catholic Conference, let me express my appreciation for the opportunity to testify before the committee.

In addition to our full statement, Mr. Chairman, I request that the legal analysis of our general counsel be submitted for the record.

The CHAIRMAN. Without objection, we will receive that for the record.

Father HEHIR. Thank you.

The committee has before it two bills, S. 431 and S. 272, both designed to address the problem created for civil rights by the *Grove City* v. *Bell* decision of the Supreme Court.

The U.S. Catholic Conference finds both bills to be inadequate and in need of amendment. However, we note that S. 431 provides broader coverage for more kinds of institutions under various civil rights statutes and in that regard S. 431 is more consonant with the objectives that the U.S. Catholic Conference seeks to provide in terms of civil rights in this legislation. So my testimony will focus primarily on S. 431 and I will comment briefly on the significance of the legislation, a word on the moral principles which bring us to this table and then propose specific modifications which the Catholic Conference believes are needed in S. 431. At the end of my testimony I will make a brief comment on S. 272.

It is the position of the Catholic bishops that the protection and promotion of civil rights is a fundamental test of the justice of any society and a fidelity to our own constitutional tradition. How we respect the basic civil rights of each person is not only a political but a moral question.

The history of the civil rights movement and the Civil Rights Act of 1964 tell the story of how this Nation came to see the interdependence of the best of our constitutional tradition and the best of the imperatives of our religious traditions.

Religious organizations were a major element in the civil rights history of the sixties and I express the basic posture of the Catholic bishops when I say that we testify on S. 431 today because we want the Catholic Church to be a significant voice and a responsible institution in protecting and promoting civil rights. I am here to reaffirm the vigorous support of the bishops of the United States for strong and effective civil rights legislation.

I precisely want to comment on religious liberty issues in light of the larger objectives of this bill because we are concerned about those larger objectives. The need to protect civil rights was a moral issue in the sixties and it remains a moral issue today. The laws which protect civil rights need to be preserved and enhanced if the gains of the last 25 years are not to be eroded.

We have had many gains, but discrimination still persists in our society. Racial, sexual, and other forms of discrimination may be less blatant but they are no less serious as moral and legal issues.

One of the most effective ways to insure that unjust discrimination is mitigated and finally eradicated is to use the power of the Federal Government to enforce a very basic principle; namely, that those institutions which receive Federal funds ought not to discriminate; thus the four measures that are included in the Civil Rights Restoration Act we believe enforce this principle.

The decision of the U.S. Supreme Court in *Grove City* v. *Bell* threatens the effectiveness of the four civil rights statutes referred to above. The effect of the *Grove City* decision allows the possibility for institutions receiving Federal funds to practice discrimination. The Catholic bishops of the United States find this unacceptable and we support the objectives of S. 431 in seeking to guarantee that institutions receiving Federal assistance will uphold the civil rights standards of this Nation.

Our support for this civil rights legislation is based on our view about the dignity of the human person, the human rights that protect that dignity and in particular the unique responsibility of the Federal authority of the society to see that discrimination is not practiced in the society. While everyone in the society has a responsibility to respect the rights of others, the Federal Government has a unique responsibility and we believe strong enforcement of civil rights legislation is necessary and the reversal of *Grove City* is necessary to see that the Federal Government fulfills its responsibility in regard to the civil rights of each person in society.

At the same time I have to raise some problems that we see. The moral and legal principles which move the Catholic bishops to support civil rights legislation also require us to raise a particular objection to the implications of one dimension of both S. 431 and S. 272.

Extending coverage of title IX will inevitably mean the extension of regulations, finalized in 1975, which require that termination of pregnancy be treated the same as other disabilities in student and employee health and benefit programs.

Precisely because we are testifying in support of civil rights, the Catholic bishops want to reaffirm their opposition to including in any way the right to abortion as a civil right.

Second, on the question of religious liberty specifically, the U.S. Catholic Conference wishes to raise the question of the religious tenet provision of title IX. As you have stated, Mr. Chairman, and others have stated, the religious tenet was included in title IX at the time of its enactment and it protects church educational institutions against conflicts between their religious beliefs and title IX.

We request that in the passage of the Civil Rights Restoration Act, that the religious tenet provision which is contained in the old bill be extended to cover all the scope of the law as it would be written in the new bill. We request that the religious tenet provision be extended to insure that noneducational institutions will also be protected. As we read S. 431 in its present form, the extension of the religious tenet provision beyond educational institutions has not been made.

Another crucially important aspect of the legislation, also treated in our general counsel's memorandum, is the nature of the Catholic institutional structure. The Catholic Conference fully supports the principle that Federal financial assistance should not be used to support discrimination and that it is reasonable to require institutions in their entirety to bear the responsibilities and obligations imposed by the four statutes as a condition of receiving Federal assistance. We are concerned, however, that in pursuing this desirable result, S. 431 will sweep within the ambit of the four statutes institutions and subunits of the churches which do not themselves receive any Federal financial assistance.

We urge the committee and the Congress to adopt appropriate amendatory language which will insure that those institutions which actually receive assistance are covered by the statutes on an institutionwide basis, but the legislation will also recognize and respect the operational integrity of individual institutions, parishes, and other subordinate units of churches which do not receive any Federal assistance.

We know that State and county governments have been accommodated in this way and we feel that legislation can be written appropriately for our concerns.

If I can summarize our position on S. 431, we find the objectives of this legislation indeed worthy of support and we want to support it. We are requesting three changes be made in S. 431:

One, an amendment to insure that title IX will not be interpreted as requiring abortion coverage in student, employee, or other benefit programs;

Two, an amendment to expand the religious tenet provision so that it corresponds to the full reach of title IX as it is envisioned in S. 431; and

Three, an amendment to recognize, as S. 431 presently does for State and local governments, that institutional coverage be confined to those units receiving Federal funds either directly or indirectly.

Regarding S. 272, the U.S. Catholic Conference finds S. 272 inadequate for remedying the consequences of *Grove City* v. *Bell.* The provisions of S. 272 incorporate institutionwide coverage for educational institutions, but it does not secure this objective for noneducational institutions. In this respect we find it seriously deficient.

Finally, we also believe that S. 272 would have to be amended in terms of the three amendments I have proposed for S. 431. In summary, we are here to support new civil rights legislation and strong enforcement of civil rights. We also wish that three amendments be added to any law that is passed.

Thank you for the consideration of the committee.

[The prepared statement of Father Hehir follows:]

Statement of Rev. J. Bryan Hehir, for the U.S. Catholic Conference on the Civil Rights Restoration Act of 1985

I testify today on behalf of the U. S. Catholic Conference (USCC). The USCC is the public policy agency of the Catholic Bishops of the United States. I wish at the outset to express the appreciation of the bishops for this opportunity to present their views on an issue of fundamental importance for American society—overcoming discrimination based on age, race, sex or handicap.

The Committee has before it two bills, S. 431 and S. 272, both designed to address the problem created for civil rights enforcement by the *Grove City v. Bell* decision of the U. S. Supreme Court. The USCC finds both bills to be inadequate and in need of amendments. However, we note that S. 431 provides broader coverage for more kinds of institutions under the various civil rights statutes. In this respect, it is consistent with the USCC's objectives. My testimony will focus primarily on S. 431; I will comment on the significance of this legislation, indicate the basic moral principles which shape the USCC position and then propose specific modifications which USCC believes are needed in S. 431. At the end of my testimony I will comment briefly on S. 272 in light of the position we are taking on S. 431.

I. THE SIGNIFICANCE OF THIS LEGISLATION

It is the position of the Catholic bishops that the protection and promotion of civil rights is a fundamental test of the justice of ~~our~~ any society, and of fidelity to our own constitutional tradition. How we respect the basic civil rights of each person is not only a political but also a moral question of the highest importance.

The history of the civil rights movement and the impact of the Civil Rights Act of 1964 tell the story of how this nation came to see the interdependence of the best of our constitutional tradition and the imperatives of our religious traditions in the question of civil rights. Religious organizations were a major element in the civil rights history of the 1960s and I express the basic posture of the USCC when I say that we testify on S. 431 today because we want the Catholic Church to be a significant voice and a responsible institution in protecting and promoting civil rights in the 1980s and 1990s. I am here to reaffirm the vigorous support of the Catholic bishops of the United States for strong and effective civil rights legislation. The prevention of discrimination was a moral issue in the 1960s. It is a moral issue today as well. The need to protect basic civil rights required the passage of strong legislation in the 1960s. Today those laws must be preserved and enhanced if the gains that we have made are not to be eroded.

During the last two decades, our society has made important strides toward eradicating many forms of discrimination. To a significant degree it was the enactment and enforcement of civil rights laws that contributed to this success. It is a precious part of our heritage—a moral, social, and political achievement that must not be weakened or allowed to regress.

Despite the gains that have been made, however, discrimination continues to be a serious problem in our society. Racial, sexual and other forms of discrimination are frequently less blatant and overt than they used to be. But the new, more subtle forms of discrimination are no less harmful to human dignity and human progress. They are no less morally offensive to the God who created us equal. It is imperative, therefore, that our society maintain and strengthen its efforts to eradicate discrimination based on race, sex, age, or handicap.

One of the most effective ways to reduce unjust discrimination is to use the power of the federal government to enforce a very basic principle—namely, that those institutions which receive federal funds ought not to discriminate. Thus Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 have been used to enforce this principle. As a result, these laws have been partially responsible for bringing about fundamental changes of enormous importance. For example, schools have been desegregated, handicapped people are being brought into the mainstream of American life, and women are making important progress toward equal opportunity in education and employment and full participation in our national life. This important progress must not be allowed to be weakened or eroded.

The decision of the U. S. Supreme Court in Grove City v. Bell threatens the effectiveness of the four civil rights statutes referred to above. The effect of the Grove City decision allows the possibility for institutions receiving federal funds to practice discrimination. The USCC finds this unacceptable and we support the objectives of S. 431 in seeking to guarantee that institutions receiving federal assistance will uphold the civil rights standards of this nation. We support the policy and enforcement of Title VI, Title IX, Section 504 and the Age Discrimination Act. Hence we support the objectives of legislation which will clarify and strengthen enforcement of these laws.

II. PRINCIPLES AND CONCERNS OF USCC POSITION

Our support for the objectives of S. 431 is rooted in basic Catholic moral teaching. We also have some specific concerns about this legislation which flow from both our moral teaching and our specific institutional structure as a church.

1. The basic moral principle which supports all of Catholic social teaching and which is the core of our position in this testimony is respect for the dignity of the human person. Catholic teaching asserts that every person is created in the image of God. Every person uniquely reflects the presence of God in the world. Unjust discrimination attacks the image of God in our midst.

2. Flowing from the dignity of the person is a spectrum of human rights through which human dignity is preserved and promoted in society. Authentic human rights are moral claims which each person can make because of his/her dignity. As the Catholic

bishops' Pastoral Letter on Racism put it: "God's word in Genesis announces that all men and women are created in God's image; not just some races and racial types, but all bear the imprint of the Creator and are enlivened by the breath of his one spirit."

3. Precisely because our rights are denied or fulfilled in society, the moral claims of human rights must be translated into civil rights, i.e., rights protected by both the moral and the civil law. Catholic social teaching affirms the social nature of the person — we develop as human persons within a social context. Therefore the political and legal order of a society is not a purely technical question but one of the highest moral significance. The importance of legislation for civil rights is that it touches upon the moral quality of a society. The responsibility to protect and promote civil rights rests upon each person and every institution in society, but Catholic teaching asserts that the civil authority of the state has unique moral and legal responsibilities in protecting basic human rights. These unique responsibilities are exercised through civil law.

→ 4. The moral and legal principles which move the Catholic bishops to support civil rights legislation also require us to raise a particular objection to the implications of one dimension of S. 272 and S. 431. Extending coverage of Title IX will inevitably mean the extension of regulations, finalized in 1975, which require that termination of pregnancy be treated the same as other disabilities in student and employee health and benefit programs. (Cf. 45 CFR, Sec. 86.40 and 86.57.) Precisely because we are testifying in support of civil rights, the Catholic bishops want to reaffirm their opposition to including in any way the right to abortion as a civil right. On the contrary, it is necessary in this testimony to call attention to the fact that the right to life is the fundamental civil right and it applies to the unborn as well as to the rest of us.

5. Moving from moral principle to an issue of religious liberty in S. 431, the USCC must raise the question of the religious tenet provision of Title IX. The religious tenet provision was included in Title IX at the time of its enactment; it protects church educational institutions against conflicts between their religious beliefs and Title IX.

The USCC's General Counsel, Mr. Caron, has prepared an extensive legal analysis of H. R. 700, S. 431 and S. 272 and it specifies our concern about the religious tenet provision. (I request that it be submitted for the record.)

The USCC sees the religious tenet provision as an expression of the abiding American sensitivity to religious freedom and it is for us a fundamental requirement in this legislation. We request that the religious tenet provision be extended to ensure that the non-educational institutions will also be protected. As we read S. 431 in its present form, the extension of the religious tenet provision beyond educational institutions has not been made.

6. Another crucially important aspect of the legislation, also treated in our General Counsel's memorandum, is the nature of the Catholic institutional structure as it would be affected by S. 431.

The USCC fully supports the principle that federal financial assistance should not be used to support discrimination. It is reasonable to require institutions in their entirety to bear the responsibilities and obligations imposed by the four statutes as a condition of receiving federal assistance. We are concerned, however, that in pursuing this desirable result S. 431 will sweep within the ambit of the four statutes institutions and subunits of churches which do not themselves receive any federal financial assistance. For example, under S. 431 all of the activities of a diocese could be subject to coverage under the four statutes if any part of the diocese receives federal assistance. To appreciate fully the potential expansive impact of S. 431 on churches, one need only consider that in the case of larger dioceses as many as four hundred or more individual parishes, and a variety of other agencies and institutions, would be required to comply with statutory and regulatory provisions even though many of those parishes and institutions do not receive any federal assistance at all.

For example, in the case of a diocese organized under a corporation sole structure, all of the parishes, as well as other unincorporated agencies or departments of the diocese, are considered to be part of the larger single entity, the corporation sole. Therefore, under S. 431, all of the parishes and other diocesan activities subsumed under the corporation sole would be subject to the four statutes if any parish or other activity of the corporation sole receives federal assistance. Even in dioceses where separate incorporation is prevalent, as is the case in some dioceses, there is a real possibility that a diocese and its separately incorporated parishes, agencies, and institutions would be treated as a single "entity" within the meaning of S. 431 because of the civil control the Diocesan Bishop can exercise over the separate corporations through his ex officio position as president, and his authority to appoint board members and to exercise veto authority in certain matters. Contributing further to this possibility is the authority of the Diocesan Bishop which exists under the canon law of the Church.

When considering diocesan structures it is important to bear in mind that parishes and other subunits of a diocese can exercise a significant degree of autonomy in their own operations, e.g., raising and use of operating funds, employment decisions, size and types of programs offered, and participation in state and federal programs. Thus, decisions of particular parishes or subunits of a diocese to receive federal assistance would trigger coverage for other parishes or subunits of the diocese which have elected not to participate in federal programs and receive no benefit from them.

To avoid extending coverage to church institutions and agencies that receive no federal assistance, we urge the Committee to adopt appropriate amendatory language which will ensure that those institutions which actually receive assistance are covered by the statutes, but which also will recognize and respect the operational integrity of individual institutions, parishes and other subordinate units of churches which do not receive any federal assistance. As discussed in the General Counsel's analysis, S.431 accommodates the operations of individual agencies and departments of state and local governments. We are confident that appropriate language can be fashioned which will similarly accommodate the legitimate concerns of churches.

III. SUMMARY OF THE USCC POSITION ON S. 431

To summarize, the USCC comes before this Committee to support your efforts to assure the equitable and vigorous enforcement of the civil rights statutes amended by S. 431. The bishops recognize the significance of the legislation you are considering and the moral and religious obligation the Church has to be a forceful advocate of civil rights within its own institutions and in society.

We are requesting that three changes be made in S. 431:

1. an amendment to ensure that Title IX will not be interpreted as requiring abortion coverage in student, employee or other benefit programs;
2. an amendment to expand the religious tenet provision so that it corresponds to the full reach of Title IX as that is envisioned in S. 431;
3. an amendment to recognize, as S. 431 presently does for state and local governments, that institutional coverage be confined to those units receiving federal funds either directly or indirectly.

These changes would assure USCC's total support for S. 431 a bill which we believe has many positive dimensions. Without these three amendments, the USCC's judgment is that S. 431 contains fundamental flaws.

IV. SUMMARY OF USCC POSITION ON S. 272

The USCC finds S. 272 inadequate for remedying the consequences of the Grove City v. Bell decision. The provisions of S. 272 incorporate "institution wide" coverage for educational institutions but it does not secure this objective for non-educational institutions. In this respect it is seriously deficient.

Moreover, in terms of the amendments we have proposed for S. 431, the USCC believes the same amendments relating to abortion and the religious tenet exception would be needed to remedy fundamental flaws in the provisions of S. 272. These are in addition to the need to expand its provisions beyond educational institutions.

V. CONCLUSION

The Catholic Bishops of the United States want to strengthen the enforcement mechanism for civil rights laws. We find the objectives of S. 431 valuable and necessary goals to be realized. If the three amendments I have set forth in this testimony are included in S. 431, the USCC can give the bill its full support.

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The CHAIRMAN. Thank you, Father Hehir.

Many critics of the amendments that you have proposed, particularly those on abortion and the religious exemption, have argued that these amendments are not germane to the underlying Grove City legislation. How do you answer to that charge?

Father HEHIR. Well, I think there are two steps in response. One on the abortion question and the second on religious tenet. We recognize that abortion is not mentioned in the legislation and so that is not the reason why we seek to have it amended, but we do recognize that precisely the administrative regulations that are used to implement the legislation, which were passed in 1975, do treat abortion as any other illness or any other medical problem, and an amendment is needed, for this law; our position should be seen in light of the whole posture of the Bishops Conference in the abortion debate since *Roe* v. *Wade*.

I would therefore argue that it is by implication that the legislation enhances and installs and reaffirms those regulations and therefore we feel in supporting the bill we have to dissociate ourselves in some way from any enhancement of those statutes.

Regarding religious tenet, there is a religious tenet provision in the statute, we understand that. We feel that expanding the scope of the legislation as the Civil Rights Restoration Act does simply requires that we make sure that the religious tenet extends to the scope and reach of the law as it would be written.

The CHAIRMAN. I find it difficult to see how anyone can suggest, for example, that the abortion amendment is nongermane. First, S. 431 explicitly ratifies in its preamble the title IX regulations and that includes the abortion regulations and makes clear to any reviewing court that such regulations are indeed consistent with congressional intent.

Second, the scope of the abortion regulations has been enhanced by amending title IX to make it institutionwide. The regulations are simply not very important today because little Federal funding goes to student health clinics and such. Under S. 431 the regulations would become very important because any funding to any department of the school could trigger their application throughout the school.

Father **Hehir**. I should say that in explaining the bishops' position, in all honesty we did not go looking for target of opportunity in this legislation.

The **Chairman**. I am sure of that.

Father **Hehir**. We came to this legislation in the first instance because it is civil rights legislation. Our conference has supported civil rights legislation, as far as I know, since its inception when any relevant bill was before the Congress. We were not looking for a target of opportunity.

We did find, as we analyzed the bill—and the legal analysis I have submitted will indicate that—that it was impossible for us to support the bill we wanted to support and not comment and call for an amendment on this particular question.

The **Chairman**. Am I not correct in believing that even the Supreme Court has never defined the right to on abortion as stemming from the Equal Protection Clause of the 14th Amendment? In other words, even the Supreme Court, despite its affirmation of a woman's right to have on abortion, has never suggested that that right's genesis has had anything to do with sex discrimination. Am I correct, Father Hehir?

Father **Hehir**. Senator, you are talking to a theologian who studies nuclear weapons and I dare not talk on the legal implications of this. [Laughter.]

I have asked Mr. Liekweg to be with me precisely in case a question like that were asked.

The **Chairman**. I first note that the *Roe* v. *Wade* decision was based upon an interpretation of the meaning of due "process of law."

Senator **Metzenbaum**. How are you doing on the nuclear weapons?

Father **Hehir**. They are simpler than this, just let me tell you. [Laughter.]

The **Chairman**. Sometimes I agree with that. Let me ask you a question about the existing religious exemption provision in title IX which you suggest is too narrow. In my own State of Utah, Brigham Young University is the largest university in the State. It is probably the largest privately owned university in the world. It is one of the relatively few schools in the country which is protected by the present exemption since it is very clearly controlled by a church organization.

On the other hand, I know that that exemption does not apply to many other universities, or most other universities, with an equally strong religious commitment—most Southern Baptist schools, and so forth. Now, could you tell us what is the status of most Catholic-oriented institutions, including small ones such as Saint Mary's in Maryland, as well as the larger ones such as Notre

Dame? Are they fully protected by this exemption, as it correctly reads, or, does the exemption need to be modified?

Father HEHIR. Senator, I would like to make a response to the best of my knowledge on this question and ask that we could amend it in the record, because, I think, I would not necessarily be able to encompass all the specific cases, and I would ask Mr. Liekweg to comment if I do not do it adequately.

The CHAIRMAN. Surely, we will keep the record open for that.

Father HEHIR. Basically, the amendment we submitted in the House to remedy the religious tenet question talked about religious institutions whose program or activity is operated or controlled by a religious organization. That was the language we used and we felt that satisfied concerns we had at the Catholic Conference.

The higher education community, not only Catholic schools but others—indeed, Father Byron, president of Catholic University, testified on behalf of NAICU in the House the same day I testified, and they were concerned that controlled or operated by was not sufficient precisely because of the changing structure of boards of trustees and others in Catholic institutions. They are convinced that the term "affiliated with" is necessary to cover their concerns. There was a wider amendment submitted precisely because of the higher institutions, the educational institutions of higher education and we supported that.

I would not want to comment in detail. I know that there has been a change of structure in many Catholic institutions whereas the religious communities no longer directly control the institutions where there are mixed boards of trustees.

The CHAIRMAN. That is my understanding also.

Father HEHIR. But there is no question that those are Catholic institutions. I could go into why, I can illustrate that, but there is no question that they remain Catholic institutions even though the structure of the board of trustees changes and the president of the college may no longer be a member of a religious community, they are still Catholic institutions. I would not attempt to summarize all of the institutions.

We obviously are concerned. I think I share some of the concerns that the Senators would have or that Congress would have. We do not want to create a civil rights bill with loads and loads of loopholes. There is no sense in fighting your way through civil rights legislation if you are simply going to run it through with loopholes. So while there is an honest question here, it is one of those cases where the law, it seems to me, would have to be written very carefully to accommodate the changed status of religious institutions as an example——

The CHAIRMAN. We agree.

Father HEHIR [continuing]. And at the same time simply not create a sieve on the civil rights question.

The CHAIRMAN. If the Federal Government provides some form of Federal financial assistance to a parish—school lunch assistance would be a good example—why is it not appropriate for other programs in the diocese structure, within which that parish is situated to be subject to Federal nondiscrimination laws? To put it another way, proponents of this legislation ask a fair question: Why should the Federal Government indirectly subsidize discrimination? I would like to hear your response.

Father HEHIR. Well, we do not think that the Federal Government ought to subsidize discrimination directly or indirectly. We are for institutionwide coverage in the bill. The question of how institutionwide coverage applies to, for example, the situation we have in many of the large dioceses where there is an organization called a corporation sole is precisely the answer to your question.

I would ask our legal counsel to respond to that question.

The CHAIRMAN. We would be happy to have your response.

Mr. LIEKWEG. In some of the large dioceses——

The CHAIRMAN. Would you also respond to my earlier question regarding the abortion issue as well?

Mr. LIEKWEG. Yes. On the latter question first, in some of the large dioceses, the diocese is organized as a corporation sole. Under that structure, virtually all the parishes, social welfare agencies and so on are incorporated under one structure. Under S. 431, if you had a situation in which, say, a parish that operates a parish school that receives some school lunch money, that parish would be covered under S. 431, and arguably all the other parishes in the diocese, whether or not they have any educational institutions or whether or not they receive any Federal assistance would also be covered.

It should be noted that, particularly on the parish level parishes have a certain amount of autonomy, particularly in their financial affairs. Decisions on whether to participate in various programs and to operate schools and so on are made at the parish level.

We did not think it was fair or reasonable to cover parishes that did not receive any Federal assistance, and did not benefit or participate in any way in any Federal programs, under statutes which were designed to cover institutions, organizations, or entities that were receiving Federal assistance.

The CHAIRMAN. Now could you answer my previous question about the relation between a right to an abortion and the Equal Protection Clause?

Mr. LIEKWEG. Again, I am not an expert on the abortion issue, but it is my understanding that under *Roe* v. *Wade* that abortion rights are protected under right of privacy and not under the Equal Protection Clause.

The CHAIRMAN. Thank you.

Mr. LIEKWEG. Also in response to an earlier question on the scope of the need or the germaneness of the abortion issue to S. 431, I would add that under the present state of the law, both S. 431 and S. 272 operate to expand coverage. Necessarily as part of that, they expand the coverage of the existing regulations which require the abortion coverage. So even though it is not mentioned specifically in either S. 431 or S. 272, the operation of either of those bills would necessarily expand the coverage of the abortion regulations. It is the purpose of the bill to expand coverage and this necessarily expands the scope of the regulations.

The CHAIRMAN. When you say "expands coverage," you mean that it expands coverage over what it was 1 day before *Grove City* or——

Mr. Liekweg. It would expand coverage from the present state of the law, which is the reality of the situation.

The Chairman. Let me just ask one other question, Father. What is your response to the concern raised by the Knights of Columbus that S. 431 likely reads as to discourage universities from sanctioning and providing support or assistance to campus organizations, such as the Knights of Columbus, which have policies which may be at odds with the requirements of title IX? The organization further claims that these situations would not be remedied by changes in the religious exemption alone. Do you share any of their concerns?

Father Hehir. Mr. Chairman, I must confess that this is the first I am aware of that concern and I would hesitate to comment on it on the record. I would be glad to submit a formal response, but I am not conscious of the issue and I would not want to——

The Chairman. We would be happy to give you a copy of their letter.

Senator Metzenbaum.

Senator Metzenbaum. Father Hehir, first let me compliment you on a well enunciated statement setting forth the position of the Catholic Conference, and let me also indicate my recognition of the fact that the Catholic Conference has been very solid in supporting civil rights activities in this country.

With respect to this issue that seems to be of the first concern—the abortion regulations—it seems to me that we may be making more of it than need be. Now, as I understand it, the House adopted some language saying that nothing in title IX shall provide any right relating to abortion. I think that was an amendment supported by the Catholic Conference.

Mr. Liekweg. In the Education and Labor bill, there was an amendment adopted, an abortion amendment.

Senator Metzenbaum. And that was an amendment supported by the Catholic Conference?

Father Hehir. That's correct.

Senator Metzenbaum. How about the Edwards amendment in the Judiciary Committee that says that nothing in the bill expresses approval or disapproval of the regulations. Does the conference support that?

Father Hehir. No, we find the Edwards amendment inadequate because, as we understand it, it will leave the regulations in place.

Senator Metzenbaum. And would the conference feel that Federal funds should be used or that Federal funds should be available even if the institution has expelled students because they had an abortion or prevented them from joining campus organizations, is that your position?

Father Hehir. As I think you know, Senator, in the debate in the House one of the questions that came up was whether this amendment could be used to discriminate against people who had had abortions. That is not our intent. We want no part of that. We understand that Mr. Tauke, who moved the amendment, explicitly adopted language in the amendment, included language. He changed our amendment precisely to deal with that question and we support that language and we want no part of any discriminatory action against anybody who has had an abortion.

Senator **Metzenbaum**. Would you repeat again what is the nub of the issue vis-a-vis the matter of abortion?

Father **Hehir**. This is a nonlawyer speaking. Title IX was passed in 1972, *Roe* v. *Wade* in 1973 obviously changed fundamentally the status of abortion in the country. The regulations that were written in 1975 to implement title IX say that abortion should be treated as any other medical question.

Obviously, the Catholic Bishops' position is that abortion is not simply one other medical question but is of a different medical, moral nature. These regulations are the means by which title IX is implemented. In passing new legislation which reaffirms title IX and expands it in its coverage, by implication the regulations which are attached to it also are expanded in terms of the abortion question. And therefore the bishops found themselves in a position of (a) wanting to support the civil rights legislation, and (b) not just concerned about abortions in Catholic institutions but concerned about the abortion issue as a political, moral, legal issue in the United States and they found themselves giving support to those regulations which treat abortion as any other medical problem and so they are asking in a sense that that be clarified by an amendment which sees that this legislation will not incorporate those regulations.

Senator **Metzenbaum**. And would your position be that you are not asking Congress to effect or overturn those regulations vis-a-vis title IX, but that you do not want to expand the regulations?

Father **Hehir**. No. No, I think that——

Senator **Metzenbaum**. Or are you asking to overturn those regulations?

Father **Hehir**. The regulations would be overturned. The effect of our amendment would be that the regulations would be overturned.

Senator **Metzenbaum**. And that is where my point in any earlier opening statement is relevant. That is, no matter what we deal with around here, we find the abortion issue squarely in front of us. Now, it seems to me that I do not know of any legislation—proposed by the Catholic Bishops or by anyone else—to overturn the regulations under title IX.

Now we suddenly come down the road with a bill to overturn *Grove City* and this issued is raised. The thrust of my question is, if the regulations and title IX are not expanded or were not to be expanded by this legislation, is there not some reason to question the propriety of the bishops conference which is supportive of this legislation in injecting into this that very controversial issue? You are going further than you have to.

I can understand you saying this bill should not extend those regulations, but why are you asking us to overturn them since these regulations have been in effect for some time. To the best of my knowledge, I do not know of any legislative issue we have had relative to overturning them.

Father **Hehir**. From an historical point, Senator, it is true, we have never been part of any legislation that the title IX regulations were part of or else we would have been forced to do this at an earlier time. It just happens that the nature of legislative activity that had affected title IX or had included them, we just were never part of the argument in any way. It became part of the argument only because the primary concerns of this bill are also very major concerns of ours and we wanted to be part and parcel of trying to get stronger civil rights legislation.

As I understand it from our legal analysis, it is intrinsic to the legislation that the regulations (a) are reaffirmed by the Civil Rights Act in itself, so the regulations, the notion that abortion is the same as any other medical problem is simply reaffirmed in new legislation, and (b) it is expanded because by definition the function of S. 431 or even S. 272 is to expand beyond the present state of the law in *Grove City*.

Senator METZENBAUM. My question and the thrust of my inquiry, is whether or not, if this Congress were to determine—and I am not at all certain who else would agree with this—that there is nothing in this legislation that shall be interpreted to have any impact on the regulations issued under title IX, either affirming them or challenging them, and nothing in this legislation shall be deemed to expand the regulations or the language of title IX in connection with this subject, it would seem to me that then everyone could agree that this is purely a civil rights bill and not confuse the issue with the abortion issue, because we would leave everything in place and in this bill we would make no changes.

Father HEHIR. My first response, Senator, it seems to me it is hard to say that the regulations exist to interpret the legislation or title IX, we are dealing with title IX in the legislation and you are not doing anything to the regulations and they have to remain on the books.

Senator METZENBAUM. The English language gives us a great opportunity to say what we want if we use it appropriately. All we have to say is that nothing is this bill shall in any way affect—and I am sure somebody can say it better than I am saying it—affect those regulations. The bill shall not be deemed to be an affirmation of those regulations, nor shall it in any way negate them, and the entire thrust of this legislation is to have no impact whatsoever on that subject, nor shall anything in this legislation be interpreted to expand upon those regulations as provided under title IX.

Father HEHIR. As I read the position we have put before you and the implications of the law, that would not satisfy the concerns of the bishops when they proposed the amendment. However, I would like to treat it at more length and fairly and therefore, if it is all right with you, I would be glad to put a formal response to your question in the record.

The CHAIRMAN. We will keep the record open for that purpose.

Senator METZENBAUM. I would appreciate that. There may be 534 people in the Congress who do not agree with that kind of a solution, but one Member thinks that there might be some merit to at least considering it.

Father HEHIR. I would be happy to take that under consideration and respond formally.

[The information referred to follows:]

The approach suggested in the question would not be consistent with the amendment that the Conference is seeking. The Conference would be willing, however, to review any proposed amendments to the bill relating to the abortion issue. Any such amendments would, of course, be reviewed in light of our longstanding position in opposition to abortion.

Senator METZENBAUM. One last question. The question is this: between S. 431 and S. 272, which legislation do the Catholic bishops support?

Father HEHIR. Well, as I indicated in my testimony, we think that the framework of S. 431 is really the same framework that was in the original H.R. 700, and when we testified on H.R. 700 we said the basic framework and objectives of that bill were moving in the direction we wanted to move in, and we find that a more consonant framework than S. 272.

Senator METZENBAUM. Thank you.

The CHAIRMAN. Senator Stafford.

Senator KERRY. Mr. Chairman, I am sorry to interrupt, but I have a conflict and I would like to simply ask that the record remain open for the possibility of written questions if I am unable to get back.

The CHAIRMAN. We will be happy to do that. We will keep the record in all these hearings open for a reasonable period of time for written questions from any Senctive on the committee We are sincerely interested in getting exploring all of these issues.

Let me In that regard, before I turn to you, Senator Stafford, without objection, let me place the General Counsel's analysis in the record.

Father HEHIR. That is the one I asked to be submitted at the opening of my testimony.

The CHAIRMAN. All right. You did so ask and I have already put the document in the record.

Father HEHIR. Yes.

The CHAIRMAN. The general counsel's analysis is, in fact, in my judgment, a meticulous and very thorough analysis of this issue. I compliment him for his work on it.

Thank you. Senator Stafford.

Senator STAFFORD. Thank you, Mr. Chairman. I will have no questions at this time. I understand that while I was necessarily out of the hearing room some of the questions that had occurred to me have already been asked of the witness and if further ones do occur to me I will submit them in writing.

The CHAIRMAN. Thank you, Senator Stafford. We will turn to Senator Simon now at this point.

Senator SIMON. Thank you very much.

First of all, let me say that the Father here has contributed immensely and while the nuclear letter of the bishops is not the subject of this committee, it was a gigantic contribution to an important dialog in this country and I am very grateful to you for that.

Let me first ask one clarifying question of your counsel so that I understand the legal structure. I had assumed that, say, in the Chicago archdiocese the Loyola University would be a separate corporation and St. Francis Xavier Parish would be a separate corporation, and each entity would be a separate corporation. But as I understand your testimony, that may not be the case, that there may be one corporation for the entire diocese.

Mr. LIEKWEG. That is basically correct, and let me just expand on that a little bit. Loyola University is a Jesuit institution, as I understand it, so that it is probably owned, or was initially owned and operated, by the Jesuits. That would fall outside of the corporation sole structure of the archdiocese of Chicago.

In Chicago, there are over 400 parishes and all of those parishes are under the single structure of the corporation sole. There are also various other agencies and entities that also fall within the single structure of the corporation sole. There may be a few diocesan established corporations that are separate corporations, but by and large in that kind of corporation sole structure virtually everything in the diocese would be within that one corporate entity.

Senator SIMON. All right. Father Hehir, one general hypothetical question: If S. 431 were not changed at all and you were a member of the U.S. Senate, would you vote for it or against it?

Father HEHIR. If it were not changed at all, I would have to say, Senator, that at my first look I might have just voted for it. As these other questions were raised, I came up against, with all the support I have for the civil rights objectives in the legislation, I came up against not only political problems but moral conflicts which make it necessary for me to amend the bill in order to vote for it.

Senator SIMON. All right. You mentioned the problem of the current language. The law says the section shall not apply to an educational institution which is controlled by a religious organization, and so forth. I read Father Bill Byron's testimony and, I frankly, was not aware until then of how that has been interpreted by the department, and it is excessively tight, it seems to me in its interpretation.

Father HEHIR. That seems to be the problem.

Senator SIMON. At the same time I am concerned by the very thing that you mentioned, that we do not want to create loopholes that we can drive trucks through. And when I read the House language, when it says "controlled, owned, managed, operated, supported by or affiliated with a religious organization," you know, supported by can mean 1 percent of the budget or $300. You know, it is a pretty passive kind of a loophole.

I am wondering if it is possible to retain the present language of the statute and have report language that would make clear to the department that we think that their interpretation of what controlled by means is too tight, too rigorous a regulation. Does that strike you as a possibility, rather than the House language which really opens the barn door?

Father HEHIR. Well, as I indicated, Senator, our original amendment was much more tightly written than what was adopted in the House, although we did support what was adopted in the House because it was proposed by Congressman Jeffords as a substitute for the amendment that we were supporting, and so historically we had a more narrow amendment.

But in terms of the question of whether report language would cover the needs—because I understand the needs of these institutions—I spend half of my life in one of those institutions—I have some sense of the ambiguity and complexity of this problem. It would be a tragedy if we were using religious principles to create sieves in the enforcement mechanism so that clearly has got to be guarded against.

Whether report language would do it, I honestly think that somebody like NAICU, which is the organization that represents not just Catholic colleges but institutions of higher learning, would be the more adequate agency to ask that question to, and I tend to hesitate to speak in their name. It seems reasonable to me, but I just do not know whether it would be adequate.

Senator SIMON. All right. Mr. Chairman, what I will do is direct a letter to NAICU and ask that the record be kept open for their response and we will insert both in the record.

The CHAIRMAN. I would be happy to do that.

Senator SIMON. I have no further questions.

The CHAIRMAN. Thank you. We will turn to Senator Nickles at this time.

Senator NICKLES. I have no questions.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Father Hehir, you have already pointed out a number of concerns with S. 431, including the probable coverage of an entire diocese because of a single parish or church school accepting some form of indirect or direct financial assistance. Do you, therefore, consider S. 431 to be an expansion of civil rights coverage as opposed to a mere restoration as the proponents would claim?

Father HEHIR. Well, I have heard the lawyers both ways on this and our legal analysis indicates that there is concern about the way the legislation is written, that it, in fact, would be an expansion. It is clearly an expansion beyond what *Grove City* is, but we want to overturn *Grove City*, so I want to be clear about that.

We felt that there was an expansion beyond educational institutions and that was a concern of ours, and so, therefore, we would have to be interpreted as saying there is an expansion. However, we feel that can be accommodated by dealing with well defined, narrowly defined amendment language.

Senator GRASSLEY. Mr. Chairman, that is all I have.

The CHAIRMAN. Thank you so much.

Father, we appreciate your coming and you have been very helpful to the committee this morning. Thank you for the time you have spent with us.

Father HEHIR. Thank you very much.

The CHAIRMAN. Thank you so much.

We will now move to two panels for our final witnesses. The first panel includes Dr. Pat Robertson, who is president of the Christian Broadcasting Network. He is both an ordained Baptist minister as well as a graduate of the Yale Law School.

David Zweibel is director of government affairs for Agudath Israel, one of the Nation's largest grassroots orthodox Jewish organizations. He is a former member of the distinguished New York City law firm of Paul, Weiss, Rifkind, Garrison, & Wharton, and has litigated numerous religious liberty cases.

Mr. William Ball is a partner in the Harrisburg, PA, law firm of Ball & Skelly. He has been lead counsel in nearly 2 dozen religious liberty cases, including the landmark Supreme Court decision of *Wisconsin* v. *Yoder* affirming religious liberties of the Amish. We feel particularly happy to have all three of you here today.

We will give each of you 12 minutes in which we hope you can summarize your prepared testimony. We will put each of your statements in the record as though fully delivered, and we will also keep the record open for you for a reasonable time to add any additional comments you care to make in writing. We will also keep the record open for all members of the committee to ask any questions they desire.

We will proceed with all three witnesses and then ask all three of you questions at the same time.

Senator **METZENBAUM**. Mr. Chairman, may I just interrupt for a minute?

The **CHAIRMAN**. Yes.

Senator **METZENBAUM**. We have three witnesses now?

The **CHAIRMAN**. Three, and then we will go to the last three.

Senator **METZENBAUM**. I would like to point out that if you give these three witnesses 12 minutes and then we have questions, that means that the last three witnesses which are supportive of the legislation, as I understand it, as is, it sort of puts them out in left field, it brings them out after 12 o'clock.

The **CHAIRMAN**. I intend to be here.

Senator **METZENBAUM**. Well, I wonder whether the Chair would not and whether the witnesses would not find themselves able, they are very able persons, to confine their remarks close to 5 or 7 minutes.

The **CHAIRMAN**. That would be fine. We will give you 12 minutes, if you need them, but if you can confine your statement to less than twelve minutes, that will be fine.

We will proceed with you first, Dr. Robertson.

STATEMENT OF PAT ROBERTSON, PRESIDENT, CHRISTIAN BROADCASTING NETWORK; DAVID ZWEIBEL, AGUDATH ISRAEL; AND WILLIAM B. BALL, BELL & SKELLY

Mr. **ROBERTSON**. Thank you, Mr. Chairman. I am the president of the Christian Broadcasting Network and also chancellor of CBN University, which is a fully accredited graduate university, and I want to thank the distinguished chairman of the Labor and Human Resources Committee, Senator Hatch, for his kindness in allowing us to testify at this time.

It is my opinion, Mr. Chairman, that the protection and promotion of equal treatment under law is the primary emblem of justice in our constitutional system. Equal treatment is required by American jurisprudence because we retain a deep and permanent commitment to the intrinsic worth of each individual. Each person is endowed with a conscience which directs his faculties toward work, education, creativity, family life, and spiritual fulfillment and under the American regime of ordered liberty no discriminatory influences, no prejudicial policies are permitted to assault the integrity of the individual spirit, thereby vitiating the principle of equal treatment.

The equal treatment part of the equation is, I believe, clearly the motive behind the legislation that we are discussing today. Nevertheless it is the under law portion of the equation that unfortunately has not received the attention and careful thought that is necessary to protect and promote justice and liberty.

I would like to quote just a couple of sentences from a concurring opinion in the *Grove City* case. Justice Powell joined by Justice O'Connor and Chief Justice Burger, said:

> One would have thought that the Department of Education, confronted as it is with cases of national importance that involve actual discrimination, would have respected the independence and admirable record of this college but common sense and good judgment failed to prevail.

It is my personal feeling that possibly we are departing a bit from common sense in some of the legislation that has been proposed to correct the so-called *Grove City* case.

The recently introduced legislation, the Civil Rights Restoration Act, represents a new and sizable extension of Federal oversight into a vast area of American institutional life, educational life, and business enterprise. Not since 1974, except perhaps in the housing area, has such comprehensive civil rights legislation been proposed. The aggressive enthusiasm and foreboding rhetoric of the supporters of the legislation seems to suggest that the achievements in civil rights over the last two decades have somehow disappeared.

Those in a hurry to correct the *Grove City* decision and restore civil rights seem to have overlooked some of the fundamental principle lawmaking, not the least of which is to carefully regard the rights of all minority groups, even while carrying the banner of some particular group.

No. 1, I regard S. 431 as an intrusion on religious integrity. The proposed change in the definition of program or activity in four major statutes, title VI, title IX, section 504 of the Rehab Act and the Age Discrimination Act in some instances glosses over the belief systems of religious minorities by imposing a single national blueprint on groups with diverse views about the proper role of men and women, views I might add which are constitutionally protected.

Title IX authorized an institution that is controlled by a religious organization to be exempt from its provisions if they are not consistent with the religious tenets of the organization. Title IX regulations require the religious organization to file an assurance of compliance identifying the provisions which conflict with a specific tenet of such organization.

All of the religious ministries that I am familiar with seek to eliminate unwarranted distinction between the sexes, at the same time most are also committed to a biblical ethic that makes clear distinctions about roles of sexes. For example, the religious beliefs of many would be violated by some of the following sections:

First, section 86.21(c), under which applicants for admission may not be excluded on the basis of pregnancy, childbirth, termination of pregnancy, et cetera, marital status may not be made;

Second, section 86.31(b)(5) prohibits differing standards of appearance based on sex;

Third, section 86.40(b)(1) forbids suspension or exclusion of students who become pregnant, or experience an abortion;

Fourth, section 86.40(b)(5) requires readmission of a student following childbirth or abortion;

Fifth, section 86.57(b) prohibits refusing to hire an applicant for employment on the basis of pregnacy or abortion; and

Sixth, section 86.60 similar restrictions concerning preemployment status.

The religious philosophy of some institutions and schools very often are at odds with the purposes of these regulations. Some religious schools place an emphasis on men entering the ministry and the predictable result is a very light female enrollment in particular courses. Other schools are opposed to permitting off-campus cohabitation of unmarried males and females. Questions concerning parenthood, pregnancy, sexual morality, and abortion are subjects that often depend on deeply held religious beliefs. Private religious schools promulgate their beliefs to persons who have voluntarily chosen to attend such schools.

The first amendment protects the advocacy of those differing views from intrusion and regulation by Government officials. Title IX regulations, if forced on religious institutions violate the freedom of conscience of those who voluntarily chose to associate with such institutions either professionally or as students. There exists great historic diversity among our Nation's colleges and universities. Each has contributed greatly but in a unique way to the quality and richness of American life. Tolerance for a wide spectrum of institutions is tantamount to tolerance for the varied ideas that make up our pluralistic society.

Not all schools nor the students in those schools desire the exact duplication of men and women's activities. Trends may develop indicating that some women desire programs that men care little about and vice versa.

As colleges allocate resources to meet such trends, Federal regulators should not insist that enrollment violates civil rights laws, nor should men or women be made to feel they have done something wrong because their aspirations and goals do not fit into the Kennedy-Hawkins framework. The failing to recognize such trends places Congress and the civil rights bureaucracy in the position of defining the aspirations and achievements of all concerned.

I would like to quote from a man very significant in religious liberty in America, Thomas Jefferson, who said:

> To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical, and to suffer the civil magistrate to intrude his powers into the field of opinion is a dangerous fallacy which at once destroys all religious liberty. It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order. Truth is great and will prevail if left at herself.

So in conclusion of my first point, the application of title IX regulations to religious schools incorrectly balances constitutional doctrines, is overreaching and needlessly intrudes into the free exercise of religion.

Some have suggested that compliance with the reporting requirements of title IX should be regarded as a minimal inconvenience. This approach disregards the cost and inconvenience factor for college administrators already strapped by increasing budgets and declining enrollments. Moreover, the compliance requirements subjects religious belief to the scrutiny of low level Government officials.

Additionally, the wide variety of church-school relationships and denomination-school relationships can hardly be digested by compliance officers unless the Federal Government is now teaching courses in church polity. To insist that Government officials weigh the sincerity and validity of religious tenet exceptions to title IX creates a slippery slope that can only lead to excessive entanglement of Government with religion.

Compliance with S. 431 and title IX means creation of affirmative action rules and regulations, onsite compliance inspections, overlapping and contradictory enforcement procedures, duplicative recordkeeping requirements, increased liability to private lawsuits. If one or more parts of a private corporation receives Federal aid from different Federal funding agencies, each would have jurisdiction over the entire entity. Each agency in turn could enforce all four statutes. This multiple jurisdiction problem would create confusion of legal standards, multiple filings, and multiple forums and so on.

By creating a labyrinth, S. 431 would substantially depreciate the rule of law principle and its correlaries predictability, and even-handed enforcement. S. 277 was introduced by Senator Dole as a compromise approach but it is unclear as to whether it would cover the noneducational activities of educational institutions. Many colleges and universities hold interests in business and property unrelated to educational functions. I hope the committee will correct this particular ambiguity.

I would like to commend Senator Hatch for his two amendments to S. 272. The first amendment clarifies the partial religious exemption to title IX, subsection 901(a)(3) by expanding the class of protected institutions from those controlled by a religious body to those with a curriculum directed toward propagation of a particular religion. This amendment recognizes the competing constitutional interests of equal protection and free exercise of religion.

Amendment 2 properly recognizes that student aid, often in connection with Federal programs, flows directly to students and only indirectly to educational institutions themselves. I voice strong support for this amendment and those in the religious community, Senator Hatch, are grateful for your leadership in this area.

Finally, those who labor in religious colleges and universities are not the only ones to obtain protection from overreaching legislation. At CBN we have something called Operation Blessing which has recently embarked on an adult literacy campaign called Sing, Spell, Read and Write. By the end of this year, we will have 100,000 disadvantaged young people in ghetto communities around the country in literacy programs with approximately 25,000 teachers involved in those programs.

The business community is also deeply committed to furthering employment opportunity. Many businesses have literacy programs in conjunction with State and federally sponsored job training. Unfortunately, surveys indicate that other businesses do not participate because such programs increase their exposure to civil rights claims.

Our Nation's farmers, as many as 1 million of them, would also come under the broad reach of S. 431. They would be subject to new Federal regulations and all the paperwork and expense that accompanies such regulations.

The Chairman. Dr. Robertson, we appreciate the exhaustive statement you have given. Could we put the rest of it into the Record?

Mr. ROBERTSON. One last thing, Mr. Chairman, and then I am finished. I asked my staff to find out from the Congressional Budget Office how much this bill would cost the American taxpayers and how much compliance would cost the private sector. We have not received that information because such a study has not been made, but we know with multiple new layers of compliance, the cost could run into the billions of dollars, and with the budget crunch we have in our country now and the problem of tax equalization before the Senate and the House of Representatives, I would urge this committee to obtain such a study to determine the exact costs of this legislation which, I think, will be prohibitive, certainly in the private sector, possibly in the Government in its current budget posture.

Thank you very much.

The CHAIRMAN. We will direct the staff to do that.

Thank you for your statement.

Mr. Zwiebel.

Mr. ZWIEBEL. Thank you very much. Mr. Chairman and distinguished members of this committee, I am David Zwiebel, Director of the Office of Government Affairs of Agudath Israel of America. I am pleased and privileged to be here today to present testimony on the so-called Civil Rights Restoration Act of 1985.

First, a few words about the organization and community I represent.

Senator METZENBAUM. Do you have a written statement, Mr. Zwiebel?

Mr. ZWIEBEL. Yes, I do.

The Chairman. It should be in your packet.

Senator METZENBAUM. I do not have it.

The Chairman. Please proceed, Mr. Zwiebel. We will get a statement for Senator Metzenbaum.

Mr. ZWIEBEL. Agudath Israel of America is an orthodox Jewish organization. It was founded in 1922. Today, as orthodoxy has become the fastest growing segment of the American Jewish community, Agudath Israel is the broadest based grassroots orthodox Jewish movement in the country. It has 19 divisions, tens of thousands of members, with chapters in 30 States across the Nation.

Since its inception 63 years ago, Agudath Israel has been in the forefront of advocating and defending the interests and rights of American orthodox Jews who, by dress, diet, and religious observance, are often set conspicuously apart from the mainstream of American society. We at Agudath Israel are no strangers to discrimination. Little wonder, therefore, that any bill with so noble a title as the Civil Rights Restoration Act of 1985 commands our special attention.

We would like to throw our full support behind such a legislative endeavor. In this case, however, we find that we cannot. Our commitment to civil rights notwithstanding, in fact precisely because we take civil rights so seriously, we feel constrained to express our concerns about the potential adverse implications this bill will have on one of the most fundamental of all civil rights enjoyed by Americans, the right freely and fully to practice one's religion.

In considering the interplay between civil rights and religious liberty, we start with two givens. The first is that religion, by its very nature, often demands distinction. Classical Jewish law, for example, assigns distinct roles, though equally important roles, to males and females, among others.

The second given is that ours is a political system in which all people are equal in the eyes of the law. As a general rule, Government may draw no distinctions between man and woman, between black and white, between gentile and Jew.

The tension between religious liberty and civil rights arises at the intersection point of these two givens. Title IX is a good example. The basic premise underlying the statute is that Government funds must not be used to discriminate in education on the basis of sex. The general rule therefore is that to be eligible for Federal financial assistance, an educational entity must agree to treat males and females alike.

But what of those schools that distinguish between males and females because they adhere to a religious faith that demands such distinction? Should the forms of governmental assistance for which such entities are eligible come with antidiscrimination provisions attached to pressure those entities into compromising their faith?

Congress resolved that question when it incorporated the so-called religious exemption into the body of title IX. Although as others have already pointed out, the precise formulation of this exemption is not free from ambiguity—and I will be glad to respond to questions following my statement regarding those ambiguities—the intention of Congress to relieve religiously affiliated schools from having to choose between accepting Federal financial assistance and remaining faithful to their principles is clear.

I should mention that Congress has followed the same approach in other contexts as well. Consider 42 U.S.C. 300(a) (7)(b). This statute, which has been upheld by a considerable body of case law, provides that receipt of Federal funding does not require any individual to perform any sterilization procedure or abortion, does not require any entity to make its facilities available for the performance of any sterilization procedure or abortion if such activity would be contrary to the aid recipient's religious belief.

Here again, Congress has determined that adherence to religious principle ought not disqualify an otherwise eligible person or entity from participating in Federal benefits programs.

One can make a strong case for the proposition that these religious exemption statutes are constitutionally compelled. As interpreted by the Supreme Court and as elaborated in the fuller written statement I have submitted to this committee, the first amendment guarantee of free exercise of religion encompasses the right generally to be free from governmental insistence that religion be abandoned as a precondition for eligibility for public assistance benefits programs.

Whether they are constitutionally mandated or not, the religious exemption provisions represent wise policy choices. In the title IX context, for example, I think we can agree that the basic statute is designed to combat the prejudicial sexism that historically has restricted educational opportunity for half of the American public.

But when educational institutions treat the sexes differently not because of venal prejudice but because they adhere to hallowed religious principles that mandate such distinctions, it is simply wrong for Government to attach religiously unacceptable strings of indiscriminate sexual egalitarianism to the dollars it makes available to educational programs.

The Civil Rights Restoration Act of 1985 is silent with respect to the religious exemption provisions of title IX, but such silence which leaves the existing exemption intact does not mean that status quo will be maintained. That is because to the extent the bill can be read to expand the basic coverage of title IX, it would create additional pressures upon religious organizations to choose between conforming on the one hand and forfeiting Federal financial assistance on the other.

S. 431's expansive definition of program or activity creates the very real possibility that courts, or private attorneys general who have the right under the statutes to sue on any ground that they feel appropriate, will interpret title IX so as to extend the statutory prohibition against sex discrimination into areas not previously encompassed by the legislation and into areas not covered by the existing religious exemption provision.

One example: The bill's coverage would extend to a corporation, partnership, or other private organization any part of which receives Federal financial assistance. That would seem to bring for the first time noneducational entities within the coverage of title IX. The religious exemption, in contrast, by its terms applies only to educational institutions.

I could give other examples of the breadth of coverage a zealous court might read into the language of S. 431 and the limited nature of the existing religious exemption, but others have already done so and, I believe, the basic point is clear.

The bottom line is this: The Civil Rights Restoration Act of 1985 appears to broaden the basic coverage of title IX without correspondingly broadening the religious exemption of title IX.

Unless Congress makes clear that the scope of the religious exemption is coterminous with the scope of title IX coverage, religiously affiliated entities that are otherwise entitled to certain forms of governmental assistance will be compelled to make a horrible choice, their faith or their financial stability.

However well intentioned this bill may be, it puts religiously affiliated entities to that Hobson's choice. At the very least, therefore, this bill should be redesigned to insure that the scope of the religious exemption is as broad as the scope of the statute's coverage, and that no religiously affiliated entity be pressured into abandoning its principles.

Thank you very much.

The CHAIRMAN. Thank you, Mr. Zwiebel.

Mr. Ball, we will receive your testimony now.

Mr. BALL. Mr. Chairman, thank you very much for having invited me to appear here. Unlike the distinguished speakers who have gone before me and those who will come after, I am not here representing any organization but simply speaking from the perspective of a constitutional lawyer who has been involved over the years in litigation and legal action involving, in the 1960's and 1970's racial civil rights, 2nd who has been in litigation in 23 of our States and upwards of 20 times in the Supreme Court of the United States on religious liberty issues.

I have stated in the text of my testimony, which you have and which I am not going to repeat here, that I come before you as a pleader for religious liberty.

Someone called the Free Exercise Clause of the first amendment the First Freedom. Religious liberty is certainly a prime civil right and that must not be lost sight of, but it is also bracketed in the first amendment with the other most precious of our freedoms; namely, speech, press, assembly and petition, and therefore any measure which may impinge upon, or threatens to impinge upon or limit, this particular liberty must be looked at with strict scrutiny.

I also preliminarily would like to observe something that has arisen out of my practice in dealing with so many little people and larger people who are religious litigants finding themselves in court. I am forever being amazed by this paradox: First, the tremendous strength of religious organizations in this country as givers to our society, tremendous benefactors, and that contrasted with the frightening vulnerability of these associations and people, first because of frequent lack of funds. Great numbers of our churches and religious organizations and schools subsist on nothing other than the volunteered moneys which are supplied by their adherents and which they keep in stewardship for religious purposes. Second, I see the thinness of personnel—so that they have to depend tremendously on dedication, the gift by people of their lives. Third, is the fact that they have relatively little political clout by which to protect themselves.

Compare them in those terms with business and industry, with the powerful unions, and especially with respect to what Justice Black called the power and prestige of Government. So my concern is heightened when I think of those considerations.

Against that background, I would like just briefly to highlight my comments on S. 431 and then for a moment on S. 272. I now dismiss from mind what you may say were sentimental considerations concerning religious liberty or which may be thought to be sentimental considerations in favor of racial civil rights, protection against sex discrimination and so on. I look on S.431 now from the coldly analytical point of view of somebody whose life is spent in litigation.

This bill, gentlemen, is simply badly drafted. It is done with incredible looseness, lack of definition. I heard the Chief Justice of the United States attack the other day advertising by lawyers. I very much agreed with that, but I believe that a goodly number of lawyers in this country will be relieved of any felt need to advertise when this legislation is passed, because it is going to be a bonanza to the legal profession. When the euphoria has passed over the declarations that it contains about it being a Civil Rights Restoration Act, which it certainly is not, then, I think, cold realities of unconstitutional vagueness will settle in in the courts.

I look, for example, at section 908(4) which, after it has listed a number of entities which constitute a program or activity, goes on to say then any other entity determined in a manner consistent with the coverage provided with respect to entities described in paragraphs (1), (2), or (3). That is inscrutible language. I think it defies definition. I think it is very dangerous that it is not defined.

You know, the argument is so often made in connection with legislation which is not clear that this is what the Congress or the State legislature probably meant. But what the Congress meant is what the Congress said, and that is what we have to go to when we come into litigation.

There is no guidance in this paragraph that I read to you as to which of the unidentified organizations relate to which of the (1), (2), (3) paragraphs above. This looks to me like the drafting of someone whose impatience to get something done out ran his competence to do it right.

This bill also is a powerful invitation to administrative excess, and let me now turn to just one paragraph in the testimony you have in which I speak of administrative excess. In a footnote on page 11, I had this to say, if you will bear with me:

"I cannot but point to an extremely disturbing matter related to what appears to be a compulsive proclivity of administrative agencies to deal with religion in the manner suggested by Maupassant's phrase, an orangutan playing a violin. The NLRB in the parochial school cases, the Secretary of Labor in the unemployment compensation cases, recently the Bureau of the Census in another situation, and a number of other Federal agencies have demonstrated this.

"One of the great reasons for strong protective language in statutes potentially affecting religion is the intolerable burden which may be visited upon a religious body of limited resources while in the toils of an agency blind to all but its own narrow area of expertise and before the first amendment claims can be litigated in court."

I rest on my submission for a more particular analysis of S. 431 and would now like briefly to turn to a discussion of S. 272 which, for the sake of the reasonable and vital freedoms of religious organizations in the United States, I feel needs to be amended.

The amendments I have suggested, first of all, relate to the question of religious tenet itself. Tenet just does not do the trick. In *Wisconsin* v. *Yoder*, the case of the Amish parents who were criminally prosecuted for their refusal to send their children to school, the Supreme Court found no tenet that was violated. The Amish could not produce some article of faith typed up or printed which was a tenet.

Very frequently, the religious liberty case turns not upon a tenet but something broader which may be conviction, it may be an immemorial or habitual practice. Above all, it may be the ministry itself. Justice Frankfurter, in a famous opinion years ago in the *Kedroff* case, talked about the need for the liberty of churches, the liberty of religious bodies. He said that such a liberty was a free-exercise liberty, not confining that liberty to the chanciness of being able to come up with a tenet that was violated.

Then there is the problem of educational institutions controlled by a religious organization. Again, I would refer to the *Yoder* case or to the NLRB cases involving the Catholic schools, *McCormick* v.

Hirsch. Here you did not have an organization controlled by another organization, which was the point of the case. You had a ministry violated in its exercise and in its existence by the action of Government.

At page 13 of my testimony, I have presented a draft of an amendment which, I think, is very, very important to many religious groups. It speaks of abortion and homosexuality. I am not intending today to argue the substance of those issues at all. I am merely presenting the objective fact that many religious organizations have very, very basic convictions and doctrine relating to sexual differentiation and to matters sexual, among these being the questions of homosexuality and abortion.

We have consequently recommended—and, by the way, in response to Senator Metzenbaum—no one in this controversy is suggesting that present law promotes abortion. That is not the point. The point is the point that was brought out in previous testimony, and what I have suggested here is an amendment which would say: "Nothing in this title shall be construed to mean that discrimination by a religious educational institution on account of the homosexuality of any person is discrimination on account of sex within the meaning of this title where such discrimination is commanded by a religious tenet, practice, or conviction; nor shall any form of sexual differentiation observed by a religious educational institution be deemed violative of this title where such sexual differentiation is commanded by a religious tenet, practice, or conviction."

Then: "Nothing in this title shall be construed to authorize or require any religious educational institution to provide, assist in providing, or make any referral for any benefit or service relating to abortion."

Mr. Chairman, I think that is everything that I have and I thank you very much.

[The prepared statement of Mr. Ball follows:]

STATEMENT OF
WILLIAM BENTLEY BALL

BEFORE U.S. SENATE LABOR AND HUMAN RESOURCES COMMITTEE

ON
POST-*GROVE CITY COLLEGE* LEGISLATION AND RELIGIOUS LIBERTY

JULY 17, 1985

I am William Bentley Ball, partner in the law firm of Ball & Skelly, Harrisburg, Pennsylvania. My particular background, relevant to this hearing, is as a constitutional attorney who has conducted First Amendment litigation in the courts of twenty-two states and has appeared in many such cases before the Supreme Court. I have also taught, written and lectured extensively on constitutional topics. I appreciate the Committee's invitation to hear me.

I come to you as a pleader for religious liberty. From the beginning of the nation it has always been recognized that religious liberty, while a prime civil right, is, more importantly, the first listed of those cognate rights - religion, speech, press, assembly and petition - united under the protection of our First Amendment. These rights may be overridden only where their exercise poses a specific and immediate threat, not avoidable by other means, to some supreme public interest. *Thomas v. Collins*, 323 U.S. 516, 530-531 (1945); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

I shall confine my testimony today to Senate Bills 431 and 272.

SENATE BILL 431

Senate Bill 431 bears the title "Civil Rights Restoration Act of 1985". Because this title is misleading, it triggers a sense of caution as one reads other parts of the bill, lest they, too, should prove ill-founded. Senate Bill 431 does not "restore" anyone's civil rights. The bill's title is apparently adopted in order to make the public think that, prior to the Grove City decision of the Supreme Court, there had been a legal consensus respecting Title IX, that if any part or activity of any institution, or anyone in it, could be said to be in some way the recipient of some form of federal financial assistance, then the institution itself was the recipient and was subject to the restrictions of the statute. But the truth is that, however strenuously federal enforcement agencies strained to impose that interpretation, the heavy weight of judicial authority rejected it. As the Supreme Court, in 1982 (prior to Grove City) stated:

> "Title IX's legislative history corroborates its general program-specificity. Congress failed to adopt proposals that would have prohibited all discriminatory practices of an institution that received federal funds . . . . We conclude, then, that an agency's authority under Title IX both to promulgate regulations and to terminate funds is

> subject to the program-specific limitation of §§901 and 902."

North Haven Board of Education v. Bell, 456 U.S. 512, 537-538 (1982).

Instead of "restoring" anyone's civil rights, Senate Bill 431 invents, attempts to legitimate, and threatens to impose, an unprecedented and pervasive regulatory scheme upon private institutions on grounds (most dubious) that they have been extended "federal financial assistance". Here again the bill is misleading. The public is given the impression that a provenly charitable institution which totally shuns public funding is nevertheless "eating at the public trough" (to borrow the phrase of one of the bill's supporters) if it has some gossamer connection with some program of Governmental aid. It is ironic to think of thousands of educational, charitable and religious institutions in our country legalistically cornered into a posture of being public aid recipients when, as all the rational world is aware, they are givers to our society, often magnanimous in the benefactions they provide through self-sacrifice, volunteered help, and contributions of time, money and dedication in order to provide services to others.

But the misleading character of this legislation does not end there. One of its most unfortunate features is the extremely loose and confused wording which is employed in key sections of the bill. The Supreme Court has rightly warned against vague regulatory language lest "[t]he regulatory maze created . . . [be] wholly lacking in 'terms susceptible of objective measurements'. . . [where] men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." Keyishian v. Board of Regents, 384 U.S. 589, 604 (1967). The Court, in words which come strongly to mind as one reads Senate Bill 431, warned:

> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area [of those freedoms] only with narrow specificity."

Ibid.

In light of that warning, we should now examine the following inscrutable passage which is subsection (4) of Section 908 (of Title IX). This is part of the long section called "Interpretation of 'Program or Activity'" - in other words this is supposed to be definitional language. Sec. 908 says that "program or activity" means all of the operations of various named entities such as a university, a corporation, etc., and (and here is the inexplicable addition):

> "(4) any other entity determined in a manner consistent with the coverage provided with respect to entities described in paragraphs (1), (2), or (3); . . ."

It is surprising that such a paragraph as that would be seriously offered to the Congress and the public. What does it mean to "determine an entity"? Determine it to be what? Who determines it? What is a "manner consistent with the coverage"? "Manner" means a mode, or way of doing things.

Senate Bill 431 says that that mode of determination must be "consistent with" certain "coverage". Note, it is the manner, not the coverage, which is the point of Paragraph 4. This is trouble-making language in the bill and, unless it is recast to say something clear, it should be stricken.

In pursuit of clarity, we must further ask what is meant by "operations" in Section 3. The four acts' "program or activity" language is defined in Senate Bill 431 to mean "all the operations of" any of the kinds of institutions described above. But one cannot say what is meant by "operations" - a term hanging without definition. The term embraces anything whatever that an entity does - whether that be a church service, schooling, or any other sort of function. True, in order to come within the act, some part of the "operations" must have been "extended" federal financial assistance. But the term, "federal financial assistance" is extremely broad. The term is not limited to cash grants or subsidies. It appears to mean action in relation to a "part", which action, directly or indirectly, ultimately involves financial expense to the federal government. If, then, to any part of any "operation", "federal financial assistance" is extended, then the institution as a whole is within the reach of each of the four acts. As was the case with Senate Bill 2568 in 1984, we see the ready potential of Senate Bill 431 for converting a non-recipient of federal financial assistance into a recipient thereof (even though, now, the "recipient" language of the former bill has been cosmetically altered). Take this hypothetical case as an example:

> Calvary Christian School has 400 students. It is supported solely out of the free-will offerings of the congregation of Calvary Christian Church. Since its founding in 1975, it has firmly resisted participating in any form of constitutionally allowable federal, state or local benefits. It has never had contacts with any federal agency. It is tax exempt under Section 501(c)(3) of the Internal Revenue Code. One pupil, John Smith, receives assistance under a federal aid program to the blind. Calvary Christian Church, in 1980, became assignee of a $500. promissory note of Erie County in payment for land, the county being a recipient of a federal grant-in-aid.

Certainly Senate 431 can be read as requiring the submission of Calvary Christian School to federal jurisdiction. By the miracle of Senate 431's arcane language, this small Christian school may be as thoroughly under the federal thumb as a highway construction company operating under a $5 million federal authorization.

Naturally, however, Calvary Christian School, when push comes to shove, is going to be conscious of that. It will inevitably claim that surely the Congress never intended so bizarre a result. And to defend itself from absorption, it will be forced to drain off precious stewardship funds to defend its liberties in litigation. And then disturbing questions about Congressional intent will be raised. Does Calvary's tax exempt status make it a recipient ("extendee") of federal financial assistance? Does John Smith's aid make Calvary such a recipient? Or the Erie County note?

I respectfully suggest that these matters not be left to plague the courts. Above all, I urge that these matters not be left to plague religious entities. The Congress ought not set in motion a piece of legislation which is as unready as is this to be considered a safe vehicle for public use.

One could multiply, ad infinitum, examples of the bizarre application in which the new concepts of this bill can result. Section 3, for example, uses the term "school system", a term which it does not define. The term can be read to embrace any organization or grouping of private religious schools. Hence, if one school in any association of religious schools were, in some sense, deemed federally financially assisted, the whole system would be covered. The term, "system", in cases of religious schools, should be used warily and not carelessly. The Catholic parish schools which I represented in the federal court case of (Caulfield v. Hirsch (95 LRRM 3164 (E.D.Pa. 1977)) had canon law objections to being lumped into a "system" in order to accommodate NLRB jurisdiction, while schools which I have represented in a number of cases operated by the numerous independent Baptist churches in this country will never agree that those ministries belong to someone's "system".

It may be easy, of course, for the sponsors of Senate Bill 431 to shrug off all of the foregoing concerns as "extreme" or "far-fetched" readings of the text. We have, however, the very recent example of the reading which the Government gave Title IX itself - saying that it called for institution-wide coverage - when there had been no substantial evidence that such a bizarre reading had been authorized by the Congress. Senate Bill 431, however, will be much easier to read broadly, due precisely to the fact that it is so imprecise in its wording. When one considers the language of Congress, the _first_ test is not "What did the Congress probably mean?" but "What did the Congress actually say?" By the commonest rule of construction, what it _said_ was what it meant.

Three evils are attendant upon the broad and loose language of Senate Bill 431. First, is the patent problem of unconstitutionality indicated by Supreme Court decisions such as _Keyishian_, to which I have earlier referred. Second, however, is the bill's wide-open invitation to administrative excess. The bill has few retaining walls to confine or channel the regulatory measures which it will breed. Indeed, the false premise that this bill is "remedial" legislation, promises to spur a very luxuriant growth of administrative activity in elaboration of its various potential meanings. That in turn promises the casting of new and costly burdens upon what are (in the world of reality) non-tax-supported voluntary institutions serving our society. Third, the infinitely wavy contours of the bill will inevitably breed litigation.

SENATE BILL 272

I turn now to Senate Bill 272. In view of the fact that the crucially important salient on the religious liberty front is religious education, this bill is certainly superior to Senate 431. I read Senate 272 as providing that if a religious college, for example, were to accept federal funding for an agricultural education program, the institution itself would come under coverage of Title IX. While I would regard this overriding of the *Grove City* decision as needless from the point of view of protecting civil rights pertaining to sex, it would not appear threatening to these religious schools which reject governmental funding - *provided that* the phrases in Title IX, "program or activity" and "federal financial assistance", are very narrowly and very rationally construed. Since it would be improvident to presume such construction, and since religious liberty is so precious a liberty, it would appear that Senate Bill 272 should be amended.

A BROADENED RELIGIOUS EXEMPTION IS NEEDED

Section 901(c)(3) of Title IX (20 U.S.C. §1681(a)(3)) provides:

> "(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;"

It is not at all certain that this language is capable of construction sufficiently protective of religious organizations. First it contains a concept which has bred disputes in the past. The phrase, "institution which is controlled by a religious organization", can be read to exclude the institution which is itself a religious organization. Many religious schools and colleges today are not operated by a church or controlled by any other outside religious organization. Yet they are religious ministries, and they are entitled to the same protection which is accorded the educational institution which is controlled by a separate religious body.

Second, the word "tenet" is inadequate to protect religious liberty. In several major religious liberty cases an established religious polity or practice was not found in the formal language of one or another "tenet". In Wisconsin v. Yoder, 406 U.S. 205 (1972), a landmark religious liberty case decided by the Supreme Court in 1972, no "tenet" whatever was involved. Instead, at stake was the immemorial practice of a faith community respecting the lives of its young people. When NLRB attempted to impose its jurisdiction upon Catholic schools, no Catholic "tenet" was violated. Yet the religious liberties of Catholic schools were threatened with outrageous violation by the federal government (McCormick v. Hirsch, 460 F.Supp. 1337 (M.D.Pa. 1978)). The confining term, "tenet", leaves broad areas of religious life unprotected, one of the most significant of these being the religious ministry or organism - the faith community. The Supreme Court has long recognized that freedom of the religious organism itself is constitutionally protected, quite apart from any freedom to observe a particular "tenet". Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 448 (1969).*

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* I cannot but point to an extremely disturbing matter related to what appears to be a compulsive proclivity of administrative agencies to deal with religion in the manner suggested by Maupassant's phrase, "an orangutan playing a violin". The NLRB in the parochial school cases (see NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)), the Secretary of Labor in the unemployment compensation cases (see St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981)), and a number of other federal agencies have demonstrated this. One of the great reasons for strong protective language in statutes potentially affecting religion is the intolerable burden which may be visited upon a religious body of limited resources while in the toils of an agency blind to all but its own narrow area of "expertise" and before the First Amendment claim can be aired in court.

It is to be hoped that amendatory language such as the following might adopted:

> "(3) this section shall not apply to an educational institution which is an integral part of the religious mission of a church, or which, although not part of such mission, is religious in purpose and character, and for whom application of this subsection would not be consistent with religious tenets, convictions, practices or ministry of such institution."

I have no doubt that the Congress in enacting Title IX did indeed desire to protect religious liberty and that it conceived that the exemption in §901(c) did exactly that. Nothing that I have found in the legislative history of Title IX indicates that there had been any information presented, or any real focus upon, the more meaningful conception of religious liberty signified by the terms, "ministry", "conviction" and "practice".

"SEX DISCRIMINATION"

At this point, it is important to comment on "sex discrimination" in the special context of religious institutions. Many religious bodies - Catholic, Protestant, Jewish - are theologically bound to observe certain forms of sexual differentiation as well as certain doctrines which relate to sex (*e.g.*, respecting homosexuality, or abortion). This is not the occasion to present the Committee a brief in defense of such observances. Suffice it to say that the observance of a religious tenet or conviction commanding sexual differentiation is a matter of fundamental religious liberty.

If the adequate religious exemption which I have above suggested were not adopted, I would then have concern with respect to the liberty of all religious educational institutions which are not controlled by some other religious organization to observe their convictions respecting homosexuality and abortion. In that event they would clearly need statutory protection, and that would consist of an amendment limiting the term "discrimination" as found in §901(a). A suggested text would be as follows:

> "Nothing in this title shall be construed to mean that discrimination by a religious educational institution on account of the homosexuality of any person is discrimination on account of sex within the meaning of this title where such discrimination is commanded by a religious tenet, practice or conviction; nor shall any form of sexual differentiation observed by a religious educational institution be deemed violative of this title where such sexual differentiation is commanded by a religious tenet, practice or conviction.
>
> "Nothing in this title shall be construed to authorize or require any religious educational institution to provide, assist in providing, or make any referral for any benefit or service relating to abortion."

I conclude this testimony as I began it, as a pleader for religious liberty. I have no hesitancy in stating that Senate Bill 431 should be rejected by the Congress on constitutional grounds. Senate Bill 272, while superior to Senate Bill 431, needs amending. The opportunity now presents itself to this Committee to advance the cause of civil rights and civil liberties by moving for full protection of what has rightly been called "the First Freedom" - religious freedom.

The CHAIRMAN. Thank you, Mr. Ball. I want to thank all three of you for being here today. Each one of you has addressed the issue of the religious exemption. Now, how would you respond to the contention that any further expansion of the exemption would simply serve to undermine the public policies, that title IX seeks to promote? In other words, where is the balance to be drawn between the legitimate first amendment rights of schools covered by title IX and the public policy interest that underlie it? Let us start with you, Mr. Zwiebel, and then we will turn to Dr. Robertson and then Mr. Ball.

Mr. ZWIEBEL. Well, I think, it is a very fundamental question. I think that constitutional law gives us some framework for measuring the appropriate standard by which to determine if an entity is entitled to be an entity that is exempt from laws that are binding upon other segments of society.

The first amendment guarantee of free exercise of religion, according to the courts, is an interest of the highest order. It is an interest that, unless Government can demonstrate some compelling governmental interest which cannot be achieved by any less restrictive means, it is an interest which has to be accommodated under our constitutional system.

I think, therefore, that certainly to the extent that the existing religious exemption is inadequate to address those legitimate first amendment concerns, I think it would be entirely appropriate for Congress to expand upon that exemption at a minimum to make it clear that the exemption is, as I mentioned in my testimony, coterminous with the coverage of the statute, because the existing situation and certainly with the advent of the Civil Rights Restoration Act of 1985, would be that there are genuinely religious entities that are covered by portions of title IX and are not exempt notwithstanding that their religious tenets—I take Mr. Ball's suggestion very well, I do not know if tenet is the right word, principle, perhaps, or convictions—compel them to disregard or disobey the commands of title IX.

The CHAIRMAN. Dr. Robertson.

Mr. ROBERTSON. Thank you, Senator. I rely on the first amendment which says "Congress shall pass no law respecting the establishment of religion or prohibiting the free exercise thereof." I believe that the framers of the Constitution had in mind a pluralistic diverse system that was, where possible, carried out on the local level by various religious bodies, and I do not think that they ever intended to have one uniform definition of religious values stemming from Washington. That was the reason for the first amendment in its precise language. And, I think, that legislation which enforces certain moral standards on religious bodies by Washington flowing out across the Nation flies in the face of the type of pluralism and diversity which has made this country great.

The CHAIRMAN. Thank you. Mr. Ball.

Mr. BALL. Senator, I am going to ask you if you would repeat the question, because I am not sure that I got it right.

The CHAIRMAN. Certainly, I asked: How do you balance the interests of the public in having title IX apply across the board with the legitimate first amendment rights of schools covered by it.

Mr. **Ball**. Yes, I did have it right. I would balance it by the amendment which I have suggested. I think we have to put into scope what Dr. Robertson has spoken of and what Mr. Zwiebel has spoken of. We have to realize that here we are dealing with a first amendment freedom and a religious civil right, and I see no problem that any weakening or diminution of title IX rights is going to take place by putting into proper place other basic rights and making sure that they are protected.

We have the great fear of excessive intrusion by Government into religious agencies, into religious entities, and there we have to consider the warnings that the Court expressed in *Walz* v. *Tax Commission,* and Lemon-Kurtzman on entanglement and governmental intrusion, surveillance, monitoring, et cetera.

The **Chairman**. I share your concern. I think that the problem of entanglement or intrusion is increasing rather than decreasing as we continue to become a more modern and more complex society. I have looked carefully at the myriad regulations attempting to implement title IX. They not only relate to issues of abortion and pregnancy but also to such matters as standards of personal appearance, discipline, and so forth. Do you agree with me, Mr. Zwiebel?

Mr. **Zwiebel**. Indeed.

The **Chairman**. I have heard some critics of these regulations suggest that they do not go far enough in eliminating institutional sex discrimination. How would each of you respond to the comment that there is a fundamental dichotomy between the idea of what constitutes sex discrimination by those who draft such rules and regulations and those who labor in the vineyards of the thousands of religious educational institutions throughout the Nation? Is there a fundamental conflict of values between those two views? Mr. Zwiebel.

Mr. **Zwiebel**. Now, the word "discrimination" has assumed a character that it may not have had years ago. We tend to speak about a discriminating taste, the person who has certain discriminating characteristics as praiseworthy, a person who is able to choose between things. Of course, today in our society when we speak of discrimination, it has certain negative overtones that have come to be attached with those words, and to some extent, I guess, there are those who would elevate the notion of unbridled egalitarianism which the revulsion against inappropriate forms of discrimination has engendered, elevate that to the status whereby it is binding upon all segments of society.

Indeed, I have heard some suggestions which I would support entirely as pointing out that religious discrimination not be exempt from the title IX provisions but, rather, ought to be defined as not being a form of discrimination because we do not think that it is appropriate for Government to look at us and say that by following your time-hallowed religious principles in this area, what you are doing is discriminating, but we will be nice to you and exempt you from the provisions.

The **Chairman**. Thank you. Dr. Robertson.

Mr. **Robertson**. Mr. Chairman, there is a code of conduct embodied in what is known as the Ten Commandments that have been respected in our society, in our Judeo-Christian culture. One of those commandments is "thou shalt not commit adultery," thus, immorality among married people is considered a wrong by our religious society.

There is also a provision, "thou shalt not commit murder," and there are those who feel that abortion is a form of murder. Well, what we are dealing with here is the compulsion of the Federal Government to force people into a mode of compliance which may violate their view of the Ten Commandments. It is not a question of these people in forcing others to do what they want them to do, but they voluntarily come together in associations in colleges and universities, pay their money freely to go there, and the question is how much coercion is the Federal Government going to be involved in to force those schools to adopt mores which are contrary to the basic tenets of their faith, and that is the thing that we are most concerned about.

Yes, there is a chasm between those who would set regulations on one side and those of the Judeo-Christian tradition or the Buddhists or other religious traditions on the other.

The CHAIRMAN. Mr. Ball.

Mr. BALL. Mr. Chairman and members of the committee, the U.S. Court of Appeals for the Fifth Circuit, on June 26, 1985, expressed a very clear resolution of the kind of dilemma you have posed. It there said—in the *Dayton Christian Schools* case—that there is indeed a religious liberty of sexual differentiation, and the court recognized that. The court recognizes that indeed the sex discrimination statutes of Ohio have validity and importance and it did not strike those statutes down, but it said that as applied to the special thing which is a religious organism or a faith community, they cannot prevail for it is very, very clear that the religious doctrine of that institution was involved.

The CHAIRMAN. Thank you. I believe my 10 minutes have expired. Senator Metzenbaum.

Senator METZENBAUM. I thank you, Mr. Chairman.

I want to be clear as to the groups for whom each of you are speaking. Mr. Ball has said he speaks for himself. Mr. Zwiebel, I know you speak for Agudath Israel and you referred to orthodoxy in the Jewish religion as being one of the fastest growing segments. Am I correct that Agudath Israel really only speaks for a certain segment of the orthodox community, or do you speak for all of the orthodox community?

Mr. ZWIEBEL. Well, I would say, as I mentioned in the testimony, that we represent the largest membership based grassroots group in the country of orthodox Jews. There may be some——

Senator METZENBAUM. Synagogue Council of America is broader?

Mr. ZWIEBEL. Synagogue Council of America is a rabbinical group as opposed to Agudath Israel of America, which is a grassroots membership base.

Senator METZENBAUM. But you have a membership group, but it does not represent all orthodox Jews in this country?

Mr. ZWIEBEL. I do not claim to represent all orthodox Jews. As a matter of fact, I think, it is inappropriate for anybody ever to claim to represent all of anything.

Senator **Metzenbaum**. I just was a little misled by your statement talking about how orthodoxy had grown that much and that did confuse me a bit.

Mr. **Zwiebel**. I am sorry if it did.

Senator **Metzenbaum**. Dr. Robertson, for whom do you speak? I know that you are very well known in the media, but what is your actual constituency?

Mr. **Robertson**. It is rather diverse, Senator. I have a feeling that most of the people who come before this committee speak ultimately for themselves, but I am a member of the Southern Baptist denomination where we have 14 million members. It is the largest Protestant denomination which went on record last year in its general conference opposed to then what was called the Civil Rights Act of 1984, a position carried through into the legislation before us today.

My own constituency numbers in the millions of people in all 50 States through a broadcast entity in 13,000 American communities, but I am here as the president of the Christian Broadcasting Network and also the chancellor of a university and the president of an organization known as the Freedom Council which is active throughout the Nation.

Senator **Metzenbaum**. So let me make this point. I know you are opposed to S. 431 and S. 272, is that correct?

Mr. **Robertson**. No, Senator. I think that Senator Dole's bill, S. 272, with Senator Hatch's amendments, would be acceptable to us, although we basically are opposed to further extension of Federal power into the States, and we regard S. 431 as a noncivil rights bill. We are primarily for local autonomy and for freedom. Also S. 431 would hinder a reduction in Federal budget deficits and increase Federal tax burden.

Senator **Metzenbaum**. I do not know whether there is so much of a tax burden in this particular legislation and I am not sure that there is, but I just wanted to be certain whether or not you support a legislative thrust in the area of civil rights.

Mr. **Robertson**. Senator, we support the previous civil rights legislation that is currently on the books. The thing that I think we would be concerned about is what I would consider a tempest in a teapot. I do not think the *Grove City* problem and the court's holding was the result of a widespread abuse. *Grove City* lost on two of three counts. The only issue at stake was whether or not an institution which no one claimed discriminated should have every program in its portfolio subject to various civil rights activity and compliance. They did not wish to file the compliance forms and they said we do not discriminate, and so far we have seen no evidence that the decision has resulted in the deprivation of anyone's civil rights. If it did, I would be more concerned. I have no empirical evidence to support such a conclusion.

Senator **Metzenbaum**. Mr. Zwiebel, you do not indicate whether Agudath Israel supports a legislative thrust in this area, provided that the one major concern you address yourself to is taken care of. Does Agudath Israel have a position on the legislation generally?

Mr. **Zwiebel**. Well, the answer to that question from the organizational perspective is that our governing body of rabbis and community leaders has authorized us to take a specific position on S. 431 and that is what I presented today.

My view though is that certainly we would support strong and effective civil rights legislation in this area, and if indeed there is a way, and I am confident that there can be a way and I think that certainly the Dole bill, tempered by certain modifications such as those suggested by Senator Hatch and perhaps others, might be the way of accomplishing that. We would certainly support those types of endeavors.

Senator METZENBAUM. You prefer the Dole bill over the——

Mr. ZWIEBEL. We prefer the Dole bill because I think the S. 431 analysis—again, I am speaking personally because the organization has not taken an organizational position on the Dole bill—but personally I would certainly recommend to our group that the Dole bill be given more favorable consideration because it does not expand the coverage of title IX way beyond what I think its existing coverage is.

Senator METZENBAUM. Are you aware of the fact that in the House Congressman Edwards offered an amendment to include a provision that makes the religious exemption as broad as the coverage of title IX? And my question to you is, with that exemption, assuming the Senate were to adopt that, would you then be prepared to indicate your support for the legislation? Would that attend to your problem?

Mr. ZWIEBEL. Well, it would certainly resolve my most serious problem with S. 431. I should mention though, as I indicated in the testimony, that there are what I refer to as ambiguities in the current language of the exemption, the language of an educational institution controlled by a religious organization.

Senator METZENBAUM. Assuming we could take their——

Mr. ZWIEBEL. I have a problem with the notion of educational institution controlled by a religious organization. Each of those three clauses is in my view ambiguous, unclear. I do not know what "controlled by" means. I am not certain that educational institution would go as far as it needs to go. I am not certain whether religious organization means a separate legal entity or not. It just is in my view a very troublesome phrase.

I think that while Congress is considering that religious exemption, I think it would be wise to focus more specifically on that language as well.

Senator METZENBAUM. Thank you.

Mr. Ball, I noticed that you take issue with the inclusion of the word "tenet" because it is so difficult to define, and then I look over on page 13 of your proposal and I find that in two instances you include the word "tenet" although it should be pointed out that you add two other words with it that I must say seem to me to be even more difficult to define, such as what is the practice of religion.

In some areas I think religion of the same faith is practiced a little differently than in others. And then you say "or the conviction." That goes now to a state of mind and so I have to say to you, as a lawyer who has been before the Supreme Court often, argued the *Bob Jones* case and done other matters in that area, how do you explain to this committee your concern with the language of

Senator Kennedy's bill, of which I am a cosponsor, using the word "tenet" and then come back to us and tell us that the model language or suggested text would include "tenet, practice or conviction," I have a little difficulty in following that.

Mr. **Ball**. I can relieve you of your difficulty, Senator, because you have me exactly wrong. I did not object to the word "tenet" because it was hard to define. I think the word "tenet" ought to be there because it is relatively easy to define. In judicial proceedings many times terms like tenet, conviction, belief, et cetera, have been defined. The problem is that "tenet" is too narrow, that is the difficulty with "tenet." It is not that it is hard to define. It is the fact that it limits the religious liberty which that exemption protects to one thing, namely a "tenet." And as I have tried to explain, when my good Amish friends, for example, were before the Court, they were trying in their limited mode of expression to say that no "tenet" was involved. They could not go to some code of canon law and pull out the Amish "tenet" relating to high schooling. This was an immemorial tradition, practice, nonattendance at high school, the so-called higher education in Amish terminology. And it was this mixture of conviction and practice that moved the Supreme Court very much. They said this effort of Wisconsin violates your religious liberty but not because it violates a "tenet."

The "tenet" thing can become extremely taxing in court at times when one is held to that narrow base.

The **Chairman**. Senator, your time is expired.

Senator Grassley.

Senator **Grassley**. Dr. Robertson, I would like to start with a point that you made to Senator Metzenbaum. You said you are affiliated with the Southern Baptist Convention which has 14 million members.

Mr. **Robertson**. That is correct.

Senator **Grassley**. Do you have a resolution of your Southern Baptist Convention opposed to or in support of legislation overturning the *Grove City* decision?

Mr. **Robertson**. I do not have the resolution. It was my understanding that last year the Southern Baptist Convention in its——

Senator **Grassley**. Let me ask the question, what is the position of the Southern Baptist Convention on the Grove City legislation?

Mr. **Robertson**. The denomination——

The **Chairman**. It is in the record, you have it right there.

Senator **Grassley**. I thought that is what you said.

The **Chairman**. Yes, that is the resolution that they adopted last year.

Senator **Metzenbaum**. Would you read the resolution to us?

Senator **Grassley**. The last paragraph, right?

The **Chairman**. Read the appropriate paragraphs. Start with one and then the brackets. If you want to read the whole thing, you can.

Senator **Grassley**. No, I do not want to take time to do that, Mr. Chairman.

Senator **Metzenbaum**. Can you read the "wherefore" part?

Senator **Grassley**. I would rather finish asking my questions before I run out of time. [Laughter].

The **Chairman**. I will read it as soon as he is through.

Senator **Grassley**. Would you answer my question, please?

Mr. **Robertson**. To the best of my understanding, the Southern Baptist Convention is opposed to what was called the Civil Rights Act of 1984, which is the predecessor legislation to the particular legislation before us today. Beyond that, I do not know the language of the resolution, Senator, but that seems to be pretty much widespread opinion in the convention.

Senator **Grassley**. That leads to a point that I would like to have you clarify, if you can. Is the Baptist Convention a member of the Joint Baptist Committee? What is the position of the Joint Baptist Committee on this legislation?

Mr. **Robertson**. The Baptist Joint Committee does not truly speak for the Southern Baptists. Southern Baptists, as you know, is a convention of independent congregations and the Baptist Joint Committee does not speak for them. Now, when they come together in their assembly, that is the best they can do for an official statement, but the position of the Baptist Joint Committee is not to my thinking representative of the rank and file of the Southern Baptists or its current leadership.

Senator **Grassley**. OK. What is their position, as you understand it, on this issue?

Mr. **Robertson**. Probably in favor of some legislation, but I have not reviewed their specific position.

Senator **Grassley**. Title IX regulations require covered schools to treat abortion the same as any medical procedure provided by a student health clinic. Do you feel these Federal regulations are inconsistent with long-standing Federal policy that prohibits the Federal funding of abortions?

Mr. **Robertson**. I do, Senator, from everything I can understand about that. I think it is inconsistent.

Senator **Grassley**. On another point, the current definition of a "religiously controlled" institution requires that it be a school of divinity or that it is governed by the religious organization and receives significant financial support from the religious organization. Do you feel that these conditions are inappropriate or too stringent to include many church-affiliated schools that may desire exemption from title IX regulations that conflict with their religious beliefs?

Mr. **Robertson**. I do. That is why I would favor Senator Hatch's amendment to Senator Dole's legislation. We have a fully accredited graduate university under the general umbrella of CBN, but I am not sure that we would come under the current exemption. In order to get accreditation, an institution needs to have its own board and be more or less free-standing and most of the religious schools have broken in some fashion from the direct control of their parent denominations and so I think that, although they still have religious purposes, they are not necessarily controlled by denominations within the purview of some of the language you quoted.

Senator **Grassley**. Thank you.

The **Chairman**. Thank you.

Senator Kennedy.

Senator **Kennedy**. I want to apologize to the witnesses. I indicated earlier that I had an important meeting of the Armed Services conference where they are making the final decisions on the ASAT and the MX and the SDI which necessitated my absence, but I look forward to reading the testimony and the responses. I want to extend a warm word of welcome to the witnesses.

The CHAIRMAN. Thank you, Senator Kennedy.

Senator KENNEDY. If I could perhaps submit some questions as part of the record, I would like to do that.

The CHAIRMAN. We will keep the record open.

Let me just mention on this one point. I have been informed by counsel that the Joint Baptist Convention has raised serious objections to this bill. The Southern Baptists have recently commented on it.

The Southern Baptists believe that the Government regulation of higher education should be restricted to those areas in which Government has a legitimate interest. I will read this last paragraph of their statement:

> Therefore, be it resolved that the Association of Southern Baptist Colleges and Schools does hereby express again its opposition to that portion of the civil rights legislation of 1985 that has its purpose to impose Federal jurisdiction over Baptist colleges and universities where such jurisdiction is based solely upon the enrollment of students who are recipients of Federal funds for the purpose of education.

Senator KENNEDY. If the Senator would yield, I would like to put in as part of the record the religious groups and affiliated organizations that support the civil rights bill.

The CHAIRMAN. The list is already in the record, Senator.

Senator KENNEDY. Well, I would put them in for a quick reading. There are about 40 of them.

The CHAIRMAN. That is fine. Senator Simon.

Senator SIMON. Dr. Robertson—I want the chairman to listen to this, too—if you could reread those words of Thomas Jefferson, would you do that?

Mr. ROBERTSON. I would be happy to, Senator. It was in support of the religious freedom act, which was one of his landmarks, if I can find the quotes in my papers, I would be happy to do it.

> To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical, and to suffer the civil magistrate to intrude his powers into the field of opinion is a dangerous fallacy which at once destroys all religious liberty.

Senator SIMON. I thank you. It sounds like a pretty powerful statement against the school prayer constitutional amendment. [Laughter.]

The CHAIRMAN. Senator, we have enough problems without involving that issue in this hearing, too. [Laughter.]

Senator SIMON. Let me ask you, Dr. Robertson——

Mr. ROBERTSON. Senator, I am not here in support of that today, as I am sure you are aware. I am referring to my main concern the intrusion of the Federal Government into individual freedom, not vice versa.

Senator SIMON. Well, we join in wanting to have the Federal Government not intrude into certain areas. Let me ask, you mentioned you are chancellor of a university, what is the name of your university?

Mr. ROBERTSON. CBN University. It is a free-standing graduate university. We have five graduate schools accredited by the Southern Association of Colleges and Universities to grant the master of arts, master of science degrees in various disciplines.

Senator SIMON. You got a pretty good commercial in there very quickly.

Mr. ROBERTSON. I wanted to. [Laughter.]

Senator SIMON. Have you had a problem with the Federal in civil rights enforcement?

Mr. ROBERTSON. No, for one simple reason, we take absolutely no Federal money whatsoever. We have no basic educational opportunity grants, we have no research grants, we have no low cost government loans for dormitories. We have absolutely no Federal money at all.

The thing that concerns me, however, with this new legislation is if a veteran would come in and pay tuition with a veterans check, we would be forced to comply with the full panoply of Federal regulations or we would be in the position of having to deny that veteran enrollment because of what it would mean to us.

Senator SIMON. Let me just comment, because time is getting to be a problem here. I am a strong believer in seeing that your religious freedoms and those of all schools are protected, and if there are problems with the enforcement I will join you in seeing that we move in the right direction.

I am concerned, however, when I hear phrases, if you will forgive them—I jotted down a few—coercion, opposed to Federal intrusion into States and so forth. There is a familiar ring to those phrases. I heard them when we were talking about the original civil rights acts, and yet we have made great progress in this country, I am pleased to say. One of the things we can be proud of as Americans is the progress we have made, and I do not want to slow down that progress and I think the *Grove City* decision does that.

So somehow we have to move ahead and at the same time protect basic religious liberties, and I hope we can find a good balance here and I hope you can be part of helping us to achieve that balance.

Mr. ROBERTSON Senator, I want to tell you that for myself and my organization we have struggled for civil rights, I have been at the forefront of integration and various other types of efforts. We are operating throughout the ghettos of America to try to bring help to those people in terms of food, clothing, shelter, and also education, and we are on the side of helping the disadvantaged. It is just a question of the cost and the enforcement techniques that sometimes harm the innocent while they are also trying to go after the guilty, that is what makes us concerned.

Senator SIMON. Let me just add I hope we can find that proper balance, and I commend you for the positive things you are doing, the literacy efforts I think is a great thing. But I think we can go back to the days of having strong civil rights, go back to the pre-Grove City days and still not be a threat to you and your institutions.

Thank you very much.

Mr. ROBERTSON. Thank you.

Senator SIMON. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator. Senator, I recommend that you look at the amendment that I have submitted. I believe it would solve this problem, and solve it by meeting not only these three gentlemen's concerns but also the needs of most religious institutions around the country. It would be that simple.

Let me ask you just one last question. How do you solve the institutional problem that Dr. Robertson has raised, the problem of the GI who comes in with GI benefits and thus of indirect funding to the school? What would you say? How do you solve that problem? We will start with you, Mr. Zwiebel.

Mr. **Zwiebel**. I do not know the answer. I think that I am frankly quite troubled with the first portion of the Supreme Court's *Grove City* decision, the portion that held that notwithstanding *Grove City's* assiduous reluctance or refusal to benefit from Federal financial assistance, it was nonetheless deemed a recipient merely by virtue of its policy to admit students that received BOG funds.

I think that at some point there has got to be, when the connection between the ultimate beneficiary or recipient of funding is very tenuous with the source of the funding, the Federal Government, I think that we ought not deem that beneficiary as one that has subjected itself to the full panoply of title IX.

The **Chairman**. I see. Dr. Robertson, do you care to comment on that?

Mr. **Robertson**. Senator, I think from what I can gather in my research last year, the former version of this legislation was raced through the House of Representatives with what I would consider indecent haste. I agree with Mr. Ball that it is not well drawn.

The former language, as I understand it, used the term "direct or indirect aid," which would have taken in virtually any form of Government aid, a Social Security check for instance. A parent on Social Security paying the tuition of his or her child at a college would under that definition, if the court so ruled, extend the arm of the Federal Government to that institution or to a store or to a business or to a farm.

The new language says "assistance which supports," which again is not clear, it is about as broad as the previous language and it seems to me that at a very minimum this legislation needs to be discussed thoroughly and each of these words needs to be hammered out with a clear legislative record. Otherwise as in the previous debate in the House of Representatives, when two sponsors of the bill disagreed about the meaning of their own legislation, the courts will indeed be exploited by another lawyers' relief act, as Mr. Ball so eloquently stated. It will create a nightmare of enforcement because S. 431 would mean that the regulations of the Federal bureaucracy will then replace the role of the Congress. Likewise the courts could further confuse the issues, and I believe the consequences would be harmful to the cause of civil rights.

The **Chairman**. Thank you. Mr. Ball.

Mr. **Ball**. I would agree with what both speakers have said. I too have great difficulty with part 1 of the *Grove City* decision. It seems to me very clear that if a religious institution accepts, say, a grant to subsidize a research program, the institution ought to be federally controlled in respect to that grant. But what about the institution that does not receive and does not want anything that in the rational world would be called assistance, *Grove City* being an example, CBN University being an example.

Here I think to pin Federal control onto the institution based upon what may be a gossamer relationship, would be most unfortunate.

The **Chairman**. Thank you.

Are there any other questions?

[No response.]

We want to thank all three of you for coming. We appreciate your efforts and the testimony you have given.

We will now call the last panel. It includes Dr. Arthur Flemming, who is a former chairman of the U.S. Commission on Civil Rights, as well as former Secretary of Health, Education, and Welfare; Jeanne Atkins, who is senior staff attorney for the Women's Equity Action League, which has been a leading participant in litigation relating to title IX; and Rabbi David Saperstein, who is codirector of the Religious Action Center of Reformed Judaism and today represents the Union of American Hebrew Congregations. Rabbi Saperstein is an adjunct professor of the Georgetown University Law School also.

I apologize to the three of you for the delays involved in getting you to the stand, and express the appreciation of the committee for your willingness to come and testify before the committee.

We will begin with Dr. Flemming, then we will go to Ms. Atkins, and then to Rabbi Saperstein.

STATEMENT OF ARTHUR S. FLEMMING, CHAIRMAN, CITIZENS' COMMISSION ON CIVIL RIGHTS; JEANNE P. ATKINS, STAFF ATTORNEY, WOMEN'S EQUITY ACTION LEAGUE; AND RABBI DAVID SAPERSTEIN, UNION OF AMERICAN HEBREW CONGREGATIONS

Mr. **Flemming**. Senator Hatch, thank you very much. I appreciate very much the opportunity that you have afforded me of testifying on S. 431, proposed legislation which if enacted into law can mean so much to the victims of racism, sexism, ageism, and discrimination based on physical and mental handicaps.

The Civil Rights Restoration Act of 1985 deals in a realistic manner with the greatest single obstacle to achieving our national goal of equal opportunity; namely, institutional discrimination.

I would like to submit as a part of my testimony two documents, first a statement by the Citizens' Commission on Civil Rights, which I serve as chairman, and, second, a statement by the Leadership Conference on Civil Rights entitled "The Civil Rights Restoration Act," which provides us with an excellent analysis of the impact of the *Grove City* decision and the way in which S. 431 can get us back on the right track.

The **Chairman**. Without objection, we will receive both of those for the record.

Mr. **Flemming**. Thank you very much.

My comments will deal briefly with the major issues discussed in these two documents.

S. 431 has just one objective: to prevent institutional recipients of Federal funds from using the *Grove City* decision as an excuse for nonimplementation of Federal antidiscrimination laws within the institution.

Prior to *Grove City,* the executive branch and the judicial branch agreed that Congress intended if, for example, one department of an educational institution received Federal funds, the entire institution was subject to Federal antidiscrimination laws.

The Supreme Court in the *Grove City* case said that only the department receiving the funds was subject to the antidiscrimination laws. S. 432, if enacted into law, would make it clear that Congress agrees with the manner in which the executive branch and the legislative branch interpreted the anti-discrimination laws prior to *Grove City.*

S. 431 has no other objective. Many of us have contended from the beginning that S. 431 and H.R. 700 should deal only with the issue presented by the *Grove City* decision.

We are confronted with an enforcement crisis. Every day's delay in enacting S. 431 means that some institutions receiving Federal funds are denying equal opportunities to minorities, women, handicapped and older persons who will never be able to recapture those opportunities.

There is broad support for S. 431 both inside and outside Congress. The consideration of additional substantive amendments to any of the four statutes that are involved in S. 431 would delay seriously its enactment into law.

Furthermore, it would be very difficult to obtain an indepth consideration of other substantive amendments because of the realization that such consideration would create obstacles to an expeditious solution of the enforcement crisis. Events have demonstrated the soundness of this position.

The facts set forth in the document, "The Civil Rights Restoration Act," which I have made a part of my testimony, reflect a rapidly deteriorating enforcement picture—the closing of title IX cases involving athletics, of section 504 cases involving the employment of the handicapped, confusion relative to the applicability of title IX to hospitals, the creation of inconsistent and confusing situations in Federal civil rights enforcement within the same educational institutions, and the narrowing of the scope of compliance reviews.

The introduction of an amendment to title IX of the section exempting educational institutions controlled by religious organizations, and another amendment to the same title dealing with the issue of abortions have raised already more questions than they have answered.

I would like to refer more specifically to these two proposed amendments, but right now I would like to use their introduction to illustrate the point that the consideration of any substantive amendments to the four laws that are involved in S. 431 is going to seriously compromise the efforts to get enforcement of the four laws back on the track.

Their introduction has slowed down the legislative process as far as H.R. 700 is concerned. An in-depth consideration of them in the Senate would be sure to slow down action on S. 431.

All of the statutes involved in S. 431 could be improved as a result of the experiences we have had with their implementation. If we attempt to improve the statutes in connection with the consideration of S. 432, we will keep the enforcement of the statutes on dead-center for an indefinite period of time and the victims of discrimination will continue to be victimized.

Freedom of religion has been and will continue to be one of the major concerns of our Nation. Freedom of religion is not in jeopardy because of the four statutes that are a part of S. 431. S. 431 would not change the legislative status quo as far as this issue is concerned—it would not change it because all it does is to deal with the issue raised by the *Grove City* decision.

It is conceivable that any one of the four laws that are involved in S. 431 could be administered in such a manner as to violate our national concern for freedom of religion.

Sometimes we feel that the best way to protect this from taking place or to correct it after it has taken place is, under our system of checks and balances, to request the Congress to amend the law.

I can understand, therefore, why the issues raised by the two amendments to H.R. 700 and S. 431 have been raised.

An evolution has taken place in the relationships between the religious community and educational institutions founded by them. I am a graduate of a church-related institution, Ohio Wesleyan University. I served as president of that university. I understand those issues and the evolution of those issues.

But the present situation is not monolithic. It varies from one religious community to the other. The situation should be studied carefully and an effort made to reach a common understanding, but this will take time.

In the meantime, I note that the policy guidance to regional civil rights directors for resolving religious exemption requests issued by Hon. Harry M. Singleton, Assistant Secretary for Civil Rights of the Department of Education, states: "You should accept as fact that an institution is controlled by a religious organization where the specific organization is named even where no information is provided on how the organization controls the institution."

Proponents of the abortion amendment to H.R. 700 allege that it is "abortion neutral," while opponents allege that it would change the substantive law.

It is clear that the proponents of the amendment are expressing concern relative to the title IX implementing regulations while opponents are concerned that the regulations will be weakened.

This is an oversight issue that calls for an in-depth inquiry—an inquiry that might or might not result in amendments to title IX. Such an inquiry will take time, time that should be taken out of respect for the beliefs and convictions of persons on both sides of the controversy.

I believe that a definite commitment to conduct such an inquiry should be made by the appropriate committees of the House and the Senate. In the meantime, I like the spirit reflected by the amendment offered by Congressman Edwards and approved by the House Judiciary Committee which provides, "The amendments made by this act are not intended to convey either approval or disapproval of Congress concerning the validity or appropriateness of regulations issued under title IX concerning health care insurance."

This would help to insure the maintenance of the status quo pending the outcome of the oversight inqury.

The *Grove City* decision provides the Nation with the opportunity of demonstrating that it means business when it comes to enforcing our antidiscrimination statutes.

The *Grove City* decision provides the legislative and executive branches with the opportunity of replacing despair with hope in the lives of many victims of discrimination by passing and signing into law the provisions of S. 431.

We know that out of the grassroots there is strong support for this legislation, that there is virtually no opposition. We know that time is of the essence, that delay has an adverse impact on the lives of minorities, the handicapped, women, and older persons.

I urge this committee and the Congress to take favorable action recognizing as you do so that there are other issues that must be faced. But let this issue stand on its own two feet. Then let's give the other issues the in-depth consideration to which they are entitled. And let's give them that consideration without being haunted by the feeling that while we are considering them we are dragging our feet in dealing with both the constitutional and moral imperatives that are involved in S. 431.

Thank you very much.

[Responses of Dr. Flemming to questions submitted by Senator Hatch follow:]

Dr. Flemming's Responses to Questions by Senator Hatch

Q. I am very concerned about what is going on with respect to enforcement of Title IX, Title VI, Section 504, and the Age Discrimination Act as the result of the Grove City College Supreme Court decision. It has been more than one year since the decision was issued.

Would you share with the Committee what has been happening with respect to ongoing cases, new cases, and new investigations?

Are the enforcement problems limited to Title IX?

Are the enforcement problems limited to education institutions?

INSERT "A"

Mr. Flemming: In my opening statement I asked to have included as a part of my testimony a statement by the Leadership Conference on Civil Rights entitled "The Civil Rights Restoration Act" which includes an excellent analysis of the impact of the Grove City decision.

The factual information makes it clear that the Grove City decision has had an adverse impact on enforcement not only of Title IX of the Education Act Amendments of 1972 but also Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973. The impact is not confined to the enforcement of these laws in educational institutions but extends to other institutions such as hospitals, clinics, social service agencies and corporations. Furthermore, the experience up to now makes it clear that the erosion of the enforcement process will accelerate as time goes on.

We are confronted with a serious civil rights enforcement crisis.

Q. We have heard the concern expressed by some that the religious tenet exemption, which allows religious institutions which receive federal money to discriminate against women, should be broadened. In your prepared testimony, you refer to the Department of Education policy for determining religious exemption requests under existing law. This policy, articulated in a February 19, 1985 memorandum from Harry Singleton, Assistant Secretary of Education for Civil Rights to Office of Civil Rights Regional Directors, states in part:

> "More than half of the original requests contained insufficient information. However, you should not conduct any investigative activity to determine whether the information already supplied by the institution is correct. Instead, any information provided by the institution should be accepted as fact. The form letters at tab C contain qualifying language which protects OCR authority in the event that an institution has supplied erroneous information, contacting the controlling organization to confirm either control over the institution or the tenets followed by the organization would be obtrusive."

> "You should accept as fact that an institution is controlled by a religious organization where the specific organization is named even when no information is provided on how that organization controls the institution." (P.3)

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> "OCR cannot question what institution representatives claim as their beliefs." (P.3)

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This policy seems to me to be extremely liberal in favor of institutions claiming the religious tenet exemption. Do you agree?

Q. Are you aware of any request for a religious exemption which has been denied.

INSERT "B"

Mr. Flemming: I agree with you that the policy is "extremely liberal" when looked at from the point of view of institutions claiming the religious tenet exemption. I am not personally aware of any denial of a request for a religious exemption.

This is why I suggested earlier in my testimony that this is the kind of an issue that could very well be the subject of a separate oversight study and hearing by this committee to see whether or not there should be any change in language. There is no reason, however, for further delays in dealing with the enforcement crisis caused by the Grove City decision while this oversight study and hearing takes place.

Q. The sponsors of this bill have repeatedly stated their commitment that this legislation should be limited to restoring the protections of the civil rights laws prior to the Grove City decision. Do you support that limitation?

INSERT "C"

Mr. Flemming: I do, and I believe there should be strict adherence to it in order to deal expeditiously with the enforcement crisis brought about by the Grove City decision.

The **Chairman**. Thank you, Dr. Flemming.

I would like to mention that a number of people here believe we should resolve this title IX problem on an institutionwide basis and overrule the contrary holding in the *Grove City* case. That is easy. After that is done, then we can consider and resolve these very intricate and difficult other problems that have been raised. Many of us sincerely believe that the appropriate way is to proceed to solve the one easier problem first and then go into these other problems. We believe that is preferable to passing a bill that many have characterized as exhibiting sloppy draftsmanship and hastily filled with ambiguities.

Mr. **Flemming**. Mr. Chairman, I would like to comment, however, at some point.

The **Chairman**. Yes, you shall. I just want you to know that this way of proceeding would be preferable to me and to a number of my colleagues.

Mr. **Flemming**. That does state the issue and, as I say, with your permission, I would like to comment on that later.

The **Chairman**. Thank you.

Ms. Atkins.

Ms. **Atkins**. Thank you. Mr. Chairman and members of the committee, I am Jeanne Atkins, staff attorney with Women's Equity Action League, a national membership organization specializing in economic issues affecting women.

WEAL has a long history of advocacy on behalf of women as students and teachers, first seeking to establish their right to nondiscriminatory treatment in schools and colleges across this Nation, and then seeking effective enforcement of those rights by the Federal Government. I come before this committee to bring to you WEAL's experience in the enforcement of title IX and to express our strong support for S. 431 as introduced.

Just as a sidelight, Senator Hatch, I appreciate being promoted to the level of senior staff attorney, but since I am the only staff attorney at Women's Equity Action League, it would be slightly presumptuous of me to adopt that title.

The **Chairman**. I think you should be called senior staff attorney. You are an excellent attorney and deserve the title. [Laughter.]

Ms. **Atkins**. In 1984, women, minorities, the disabled, and the aging lost important legal protections when the Supreme Court, in the case of *Grove City* v. *Bell,* issued a ruling reversing more than 20 years of Federal civil rights enforcement policy. The Court held that Federal financial assistance to educational institutions obligated those institutions to provide equal opportunity not throughout the university, but only in the specific program which received Federal funds.

Since that decision, enforcement of title IX has been either inconsistent or nonexistent. Schools are now successfully challenging the Department of Education's authority to enforce the law where Federal funds are not specifically related to the discrimination charged, leaving students and teachers without remedy even for proven discrimination.

While the *Grove City College* decision involved an interpretation of title IX, a sex discrimination law, the ruling also affected the

Government's ability to enforce the rights of minorities, the handicappep, and the rights of all citizens to be free of age discrimination.

Basic to all these statutes is the principle that taxpayers' dollars should not support discrimination. Unlike the other laws, however, title IX applies only to sex discrimination in federally financed education programs. However, in the absence of an eaual rights amendment or other more complete protection, women have always regarded the right to equal educational opportunity as an important beginning.

This is so because education is widely recognized as one key to economic independence. As women have access to more educational opportunities, they are able to expand their career choices and thereby raise their wages. In 1984, fulltime women workers with a college degree had median earnings $4,500 higher than those with only a high school diploma.

The progress made since 1972 with respect to educational opportunity for women have been well documented. There are those who would argue that, in fact, all the significant barriers to women's full educational opportunity have fallen. Unfortunately, discrimination still hinders the progress and full participation of women in the academic community. In 1984, female professors continued to earn on the average 18 percent less than their male counterparts.

For women students, there is an aid gap as well as a wage gap. Women students receive only 72 cents of student aid for every dollar men receive. Women are facing a new segregation in rapidly developing high tech fields. Computer skills are vital in this day and age, yet boys currently outnumber girls by nearly 2-to-1 in high school computer classes and 3-to-1 in summer classes and computer camps.

Particularly distressing is the enormous disparity between the vocational training opportunities given to young men and women. Vocational education enrollment remains highly sex-segregated and sex-stereotyped, reflecting and then perpetuating the employment patterns of the work force.

The extent to which this segregation is due to discrimination—in the guidance and admissions processes of the schools themselves—is only now being fully recognized. Moreover, young women who do enroll in nontraditional programs are suffering harassment and a lack of support which makes their completion rates in these programs very low.

The continuing vitality of title IX is thus of primary importance. In fact, reestablishing the right to nondiscriminatory treatment in schools receiving Federal funds is WEAL's number one legislative priority this year. But at the same time that women seek to reaffirm their right to educational opportunity, they recognize that the protection provided in the other civil rights laws affect them, too.

To reaffirm title IX only, as some have suggested, would, for example, leave black women without protection from race discrimination in Federal job programs, Hispanic women without the legal right to equitable public health care, and disabled women without access to public transportation.

The Civil Rights Restoration Act, S. 431, is intended to overcome the limiting effect of the Supreme Court's decision in *Grove City*

College v. *Bell*, and no more. A concerted and sincere effort has been made to construct this legislation so that it reflects the history and past practice of enforcement agencies under Republican and Democratic administrations alike.

Although it might be a tempting thought, women's groups are not before Congress today seeking to expand the coverage of title IX to federally assisted programs beyond education. Nor are they seeking to eliminate any of the other exemptions or exclusions which already limit that law's application.

It has been our hope that substantive questions of what constitutes discrimination, how such discrimination is best remedied, or which institutions or activities qualify for which statutory exemption, could be set aside in this Congress so that the law could be reestablished as it was understood and enforced in the years before the *Grove City* decision. That continues to be our goal and we ask this committee to determine that all other issues be put aside in favor of restoration at this time.

It is in that light that any dicussion of the so-called "religious tenet" exemption to title IX must be placed. Nothing in the *Grove City College* decision or in the Civil Rights Restoration Act has any impact on the language or effect of this exemption.

Whatever its merits or demerits, the exemption's scope is a separate issue unaffected by the question of program specificity. For that reason alone, we oppose any amendment to the Civil Rights Restoration Act altering the language of the exemption, either to broaden its application or to narrow it.

The religious tenet exemption to title IX has not been to our knowledge a serious point of contention at any stage of the legislative, regulatory, or enforcement process. The brief legislative history around that particular language indicates that the primary concern was about admissions to seminaries. There was little discussion beyond that to clarify the 92d Congress' intent.

Nor has there been any litigation or enforcement problem with the exemption. The Department of Education has never denied any statement of exemption filed by a school under the current statutory language. No institution has been required by the Department of Education or any other agency to alter religiously motivated policies or practices to comply with title IX. It is therefore difficult for us to understand why this provision has become an issue in considering the Civil Rights Restoration Act of 1985.

Federal law does not generally grant blanket immunity from antidiscrimination laws to religious organizations otherwise covered by the law. None of the other civil rights laws being addressed by this legislation contain such an exemption. In fact, institutions like Bob Jones University have been held not to be entitled to Federal funds because of their asserted "religiously based" race discriminatory practices.

Title VII of the Civil Rights Act of 1964, which outlaws employment discrimination, does contain certain exemptions for religious organizations, including schools, but limits that exemption to "religious discrimination" and has not been applied to permit general policies of race or sex discrimination on the grounds that religion requires it.

Moreover, the validity of even that limited exemption has been seriously questioned where the secular activities of an organization are concerned. Several courts have asserted the strong possibility that a statute specifically allowing such discrimination might be interpreted as an inappropriate establishment of religion by the Government in violation of the Constitution.

The tension between the free exercise and establishment provisions of the first amendment have produced volumes of constitutional scholarship. WEAL does not presume to be an authority on this subject or to provide this committee with an assessment of the constitutionality of the exemption in title IX or the constitutionality of a failure to have such an exemption.

But we do know, as an organization that has monitored the enforcement of title IX for 13 years, that it is not inappropriate for supporters of title IX to be concerned that this discussion has begun. We fear that the schools that have traditionally challenged the statute's reach wish to create a more lenient standard for the exemption in order to have an alternative avenue for iding compliance.

Title IX has in its history been challenged repeatedly on jurisdictional grounds, so that private litigants and the Government have had great difficulty getting substantive enforcement.

Women's groups are not willing to solve the Grove City problem at the expense of creating a new means by which schools can challenge the Government's enforcement authority.

We urge this committee to reject amendments to S. 431 which would alter title IX's provisions beyond that necessary for restoration to its understood meaning before the *Grove City College* decision, and to approve the bill for submission to the full Senate.

Thank you, Senator.

[The prepared statement of Ms. Atkins and responses to questions submitted by Senator Hatch follow:]

WEAL
Women's Equity Action League

Specialists in Women's Economic Issues

Statement

of

Jeanne Paquette Atkins

Women's Equity Action League

Before the

Committee on Labor and Human Resources

United States Senate

Concerning S. 431

The Civil Rights Restoration Act of 1985

July 17, 1985

1250 I Street NW, Suite 305, Washington, DC 20005 (202) 898 1588

Mr. Chairman and members of the Committee, I am Jeanne Atkins, Staff Attorney with Women's Equity Action League, a national membership organization specializing in economic issues affecting women. WEAL has a long history of advocacy on behalf of women as students and teachers -- first seeking to establish their right to nondiscriminatory treatment in schools and colleges across this nation, and then seeking effective enforcement of those rights by the federal government. I come before this Committee to bring to you WEAL's experience in the enforcement of Title IX and to express our strong support for Senate Bill 431 as introduced.

In 1984, women, minorities, the disabled and the aging lost important legal protections when the Supreme Court, in the case of Grove City College v. Bell, issued a ruling reversing more than 20 years of federal civil rights enforcement policy. The court held that federal financial assistance to educational institutions obligated those institutions to provide equal opportunity not throughout the university, but only in the specific program which received federal funds.

Since that decision, enforcement of Title IX has been either inconsistent or nonexistent. Originally each federal regional office charged with enforcement authority determined when Title IX might apply and when it did not. WEAL immediately joined with other organizations to file suit to force the Department of Education to issue a uniform policy regarding enforcement. To date, some policy questions have been answered, but enforcement efforts in higher education are still on "hold" in many cases. Moreover, our worst fears about restrictive enforcement of the law are coming true. Schools and colleges now raise the lack of specific federal funding to the activity where discrimination has been charged as a defense to Title IX enforcement, and the government walks away.

While the Grove City College decision involved an interpretation of Title IX of the Education Amendments of 1972, a sex discrimination law, the ruling also affected the government's ability to enforce the rights of minorities under Title VI of the Civil Rights Act of 1964, the rights of the handicapped under Section 504 of the Rehabilitation Act of 1973, and the rights of all citizens under the Age Discrimination Act of 1975.

Basic to all of the statutes listed above is the principle that taxpayers' dollars should not be used to discriminate. For historical reasons, there is a limitation on the legislation embodying that principle -- Title IX applies only to sex discrimination in federally financed education programs. However, in the absence of an Equal Rights Amendment or other more complete protection, women have always regarded the right to equal educational opportunity as an important beginning.

This is so because education is widely recognized as one key to economic independence. As women have access to more educational opportunities, they are able to expand their career choices and thereby raise their wages -- in 1984, fulltime women workers with a college degree had median earnings $4,500 higher than those with only a high school diploma. Such increased options are an economic necessity to the 10.2 million women who are single heads of households and to the families in which two incomes are vital for financial stability.

The progress made since 1972 -- in the number of women pursuing higher education, entering fields formerly restricted to men, participating in the full range of extra-curricular activities from student government to athletics -- has been well documented. There are those who would argue that, in fact, all the significant barriers to women's full educational opportunity have fallen. Unfortunately, discrimination still hinders the progress and full participation of women in the academic community.

In 1984, female professors continued to earn, on the average, 18% less than their male counterparts. Even when entering formerly male-dominated arenas, the rewards have been smaller. In the fields of engineering and computer science, women faculty earned fully 35% less than men. Women are still a majority of those teaching at the instructor level, but the percentage of full professors who are women has been stuck at 10% since 1970.

For women students there is an aid gap as well as a wage gap. Women students receive only 72 cents of student aid for every dollar men receive, although they have fewer sources of income and therefore are twice as likely to be classified as independent.

Women also face a new "segregation" in rapidly developing high tech fields. Computer skills are vital, yet boys currently outnumber girls by nearly two to one in high school computer classes and 3 to one in summer classes and computer camps.

Particularly distressing is the enormous disparity between the vocational training opportunities given to young men and women. Vocational education enrollment remains highly sex-segregated and sex-stereotyped, mirroring and then perpetuating the employment patterns of the workforce. The extent to which this segregation is due to discrimination -- in the guidance and admissions processes of the schools themselves -- is only now being fully recognized. Moreover, young women who do enroll in "nontraditional" programs are suffering harassment and a lack of support which makes their completion rates in those programs very low.

There is also an increasing recognition that academic women -- faculty, students, and staff -- are not immune to the sexual harassment experienced by other working women. Academic communities are just beginning to recognize the seriousness and pervasiveness of this problem and their legal responsibility to provide complaint procedures and education programs to address the special needs of sexual harassment victims.

The continuing vitality of Title IX is thus of primary importance. In fact, re-establishing the right to nondiscriminatory treatment in schools receiving federal funds is WEAL's number one legislative priority this year. But, at the same time that women seek to reaffirm their right to educational opportunity, they recognize that the protections provided in other civil rights laws affect them too. To reaffirm Title IX only, as some have suggested, would, for example, leave black women without protection from race discrimination in federal job programs, Hispanic women without the legal right to equitable public health care, and disabled women without access to public transportation.

Public discussion about the Grove City College decision and its ramifications has reopened what civil rights groups believed were long-settled questions regarding the government's obligation to enforce civil rights laws. Once more, it is being alleged that such enforcement is too burdensome and intrusive. For women seeking equity in education, however, the failure of the government to provide basic civil rights results in economic burdens too heavy to accept.

THE CIVIL RIGHTS RESTORATION ACT AND RELIGIOUS INSTITUTIONS

The Civil Rights Restoration Act, S.431, is intended to overcome the limiting effect of the Supreme Court's decision in Grove City College v. Bell, and no more. A concerted and sincere effort has been made to construct this legislation so that it reflects the history and past practice of enforcement agencies under Republican and Democratic Administrations alike. Although it might be a tempting thought, women's groups are not before Congress today seeking to expand the coverage of Title IX to federally assisted programs beyond education. Nor are they seeking to eliminate any of the other "exemptions" or "exclusions" which limit that law's application.

It has been our hope that substantive questions of what constitutes discrimination, how such discrimination is best remedied, or which institutions or activities qualify for which statutory exemption, could be set aside in this Congress so that the law could be re-established as it was understood and enforced in the years before the Grove City decision. That continues to be our hope, and we ask the Committee to determine that all other issues be put aside in favor of restoration at this time.

It is in that light that any discussion of the so-called "religious tenet" exemption to Title IX must be placed. Title IX states:

> this section shall not apply to an

> educational institution which is
> controlled by a religious organization
> if the application of this subsection
> would not be consistent with the
> religious tenets of such organization.

20 U.S.C. Section 1681 (a)(3).

Nothing in the Grove City College decision or in the Civil Rights Restoration Act has any impact on the language or effect of this exemption. Whatever its merits or demerits, the exemption's scope is a separate issue unaffected by the question of "program-specificity". For that reason alone, we oppose any amendment to the Civil Rights Restoration Act altering the language of the exemption -- either to broaden its application or to narrow it.

The religious tenet exemption to Title IX has not to our knowledge been a serious point of contention at any stage of the legislative, regulatory, or enforcement process. The brief legislative history around that particular language indicates that the primary concern was about admissions to seminaries. There was little discussion beyond that to clarify the 92d Congress' intent.

Nor has there been any litigation or enforcement problem with the exemption. The Department of Education has never denied any statement of exemption filed by a school under the current statutory language. No institution has been required by the Department of Education or any other agency to alter religiously-motivated policies or practices to comply with Title IX. It is therefore difficult for us to understand why this provision has become an issue in considering the Civil Rights Restoration Act of 1985.

Federal law does not generally grant immunity from anti-discrimination laws to religious organizations otherwise covered by the law. None of the other civil rights laws being addressed by this legislation contain such an exemption. In fact, institutions like Bob Jones University have been held not to be entitled to federal funds because of their asserted "religiously-based" race discriminatory practices.

Title VII of the Civil Rights Act of 1964, which outlaws employment discrimination, does contain certain exemptions for religious organizations, including schools, but limits that exemption to "religious discrimination" and has not been applied to permit general policies of race or sex discrimination on the grounds that religion requires it. Moreover, the validity of even that limited exemption has been seriously questioned where the secular activities of an organization are concerned. Several courts have asserted the strong possibility that a statute specifically allowing such discrimination might be interpreted as an inappropriate "establishment" of religion by government in violation of the Constitution.

The tension between the "free exercise" and "establishment" provisions of the First Amendment has produced volumes of Constitutional scholarship. WEAL does not presume to be an authority on this subject or to provide this Committee with an assessment of the Constitutionality of the exemption in Title IX or the Constitutionality of a failure to have such an exemption.

But we do know, as an organization that has monitored the enforcement of Title IX for thirteen years, that it is not inappropriate for supporters of Title IX to be concerned that this discussion has begun. We fear that the schools that have traditionally challenged the statute's reach wish to create a more lenient standard for the exemption in order to have an alternative avenue for avoiding compliance.

Title IX has, in its history, been challenged repeatedly on jurisdictional grounds, so that private litigants and the government have had great difficulty getting substantive enforcement. Women's groups are not willing to solve the *Grove City* problem at the expense of creating a new means by which schools can challenge the government's enforcement authority. We urge this Committee to reject amendments to S. 431 which would alter Title IX's provisions beyond that necessary for restoration to its understood meaning before the *Grove City College* decision, and to approve the bill for submission to the full Senate.

WEAL
Women's Equity Action League

Specialists in Women's Economic Issues

Bobbie Dunn
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Ms. Dunn,

Please insert the following into the record of the Committee's July 17th hearing in response to the questions submitted by Senator Kennedy.

Q: Ms. Atkins, I am very concerned about the situation which has existed with respect to discrimination by recipients of federal financial assistance since the Grove City case was decided. Would you tell the committee what has been going on in terms of enforcement of Title IX, Title VI, Section 504 and the Age Discrimination Act since the Grove City decision? How many cases have been dropped or put "on hold"?

A: Almost immediately after the Grove City College decision, various regional offices of the Department of Education began to close, narrow, or suspend cases currently under investigation or in conciliation. By early 1985, 63 cases had reportedly been affected by such actions, including cases where investigations had been completed and discrimination found. In a dozen more cases already at the enforcement stage, schools were raising as a defense the lack of agency jurisdiction, based on the Grove City College case. The majority of these were Title IX cases, although the other statutes were also involved.

Initially, the Department of Education gave no guidance to its regional offices regarding the Grove City decision. As a result, each regional office was forced to make its own interpretation of the effect of the decision, and varying standards were being applied across the country. As a result, WEAL and other groups filed suit in federal court asking that the Department of Education be required to apply the law consistently across the country. Subsequently, policy guidance on some questions was issued from the Office for Civil Rights. However, major issues, such as the effect of Federal Work Study Program money on coverage of a college or

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university, remain unresolved by OCR.

It is difficult to know accurately the number of complaints have been rejected, put "on hold", or narrowed since the first of the year. It is also difficult to know how many school administrators have successfully discouraged grievants from going to the government with their complaint, or how much the news coverage around the Grove City College decision has led students, parents and teachers to believe that the law cannot be effective on their behalf. Certainly complainants will be deterred by the prospect of a long investigation into the location of federal funds which now must precede any substantive enforcement.

Q: How has the Grove City decision affected the willingness of colleges and universities and other recipients of federal aid to voluntarily comply with the requirements of Title IX and the other non-discrimination statutes?

A: The Department of Education has had some experience with schools refusing to participate in or complete conciliation of discrimination complaints, even where the Department has determined they have jurisdiction. Beyond that, we must rely on anecdotal evidence.

One example recently brought to our attention involved a school district in Pennsylvania which had unsuccessfully argued that it was appropriate for them to abolish an interscholastic volleyball program for girls, even though that meant fewer sports for girls than for boys and although there was both a demonstrated interest and aptitude for the sport among girl students. School officials took the position that those girls interested in volleyball had opportunities elsewhere -- namely cheerleading -- and so didn't need the additional interscholastic athletic opportunity. Upon losing that argument, school officials decided to claim their athletic program was exempt from Title IX because of a lack of federal funding to the sports program.

If I were a school or university counsel, I certainly would not advise my client to abandon the idea of nondiscrimination quite yet. Not because the Grove City decision didn't give the law a devastating blow, but because Congress has taken such immediate action to consider legislation to reverse it. Thus it would not be surprising to hear school officials say that they are in no way moving away from equal opportunity, while at the same time, should a complaint be filed, those very schools would oppose government investigation or enforcement of such claims.

Q: We know that women and girls have made significant progress towards equality in education since Title IX was passed. How important is Title IX to continued progress toward equality in education and women's economic equity?

A: It is well settled that Title IX has accomplished much for women and girls in its thirteen-year history. Once the law was passed, schools very quickly dropped arbitrary and overt limitations on the number of women who could enter graduate and professional schools. Even the most diehard intercollegiate athletic directors who had opposed Title IX's passage and its application to athletics, began to look for -- and to find -- ways of expanding their women's athletic programs. Internal grievance procedures for complaints by students were established.

But problems remain. As cited in my written testimony, women who move out of graduate programs upward into academic jobs are not being promoted or tenured as fast as their male counterparts -- nor are they as well paid. We are only now becoming aware how entrenched the bias is against girls entering non-traditional vocational education programs. The new high tech education is quickly becoming sex-segregated. All of these educational opportunity problems have the potential for a profound economic effect on young women's futures.

Do schools need Title IX to force them to address these problems? Certainly lawsuits and administrative complaints are not always necessary. Some of the best "enforcement" done over the last ten years has been by parents of elementary and secondary students in direct negotiation with administrators and school boards. But it was Title IX that got those parents in the door. Without the leverage of the law behind them, parents concerned about athletic opportunities for grade school girls, or and young women victims of sexual harassment, for instance, would have reduced access to school authorities.

Q: Some have expressed the concern that the current religious tenet exemption in Title IX is not broad enough to protect religious education institutions whose religious tenets conflict with the requirements of Title IX. Are you aware of any educational institution which has sought and been denied an exemption from the requirements of Title IX based on its religious tenets?

A: No educational institution has been denied such an exemption. Nor have any schools been required to alter religiously-motivated policies or practices to comply with Title IX, by the Department of Education or any other agency.

From documents recently obtained from the Office for Civil Rights, we know that 221 exemption requests have been filed -- all but two applied for between 1975 and 1979. Schools have complained that many did not receive any explicit grant of exemption in response, even though they have not been subject to any attempts to enforce the law. It is unclear, however, whether any immediate response was required or appropriate. The exemption, after all, is not a blanket one. It applies to areas of compliance which may conflict with a religious tenet. Except for seminaries with restricted admissions processes, which would clearly be covered by the exemption, it would rarely be the case that the entire institution was required by religious command to discriminate against female students in all its programs. The extent to which the exemption might apply, then, would depend on the particular discrimination involved.

Despite this, the Department of Education is currently processing all requests for exemption -- and giving schools in all cases the broadest interpretation of the statutory exemption as well as the greatest latitude for declaring a "religious tenet". Recently, a WEAL member had her employment discrimination complaint rejected by OCR because the school successfully argued that it could prefer male members of a particular religious order as candidates for employment.

Let me emphasize once more, as is stated in my testimony, that none of the other laws under discussion here even contain such an exemption. Given the constitutional questions such a provision raises, a broadening of this language would seem most unwise. More importantly, broadening the exemption would be in direct contradiction to the purposes of the Civil Rights Restoration Act of 1985. It would not "restore" prior law, but rather explicitly grant more federally supported institutions a license to discriminate against women.

Respectfully submitted,

Jeanne Paquette Atkins

Jeanne Paquette Atkins
Staff Attorney
Women's Equity Action League

August 13, 1985

The CHAIRMAN. Thank you, Ms. Atkins.

We will turn to you, Rabbi Saperstein.

Rabbi SAPERSTEIN. Thank you, Mr. Chairman. My name is David Saperstein and I am here on behalf of the Reform Jewish Movement representing over 1 million Jews throughout the United States and 1,400 reform rabbis.

I am also here as an attorney who serves on the faculty of Georgetown Law School, where the courses I teach deal directly with the issues that are before us today. I am here to say very simply, although I know it was not the intent of these hearings, that the impression created somewhat in earlier testimony that there is any kind of inherent tension between civil rights and religious liberty is a false distinction. Indeed our rights as religious people are fundamentally bound up with the rights of each and every person in this country who enjoy that which God has mandated to all of God's children: the opportunity and right to share equally in the benefits and the opportunities of American society.

Jewish history has a special sensitivity to oppression. In all too many countries, we have been the victims of discrimination and persecution. We know full well that so long as any minority can be subject to discrimination and deprived of equal rights and opportunities, then neither we nor any other minority is truly safe or secure.

We are here today to reaffirm our profound commitment to the identification and removal of every instance of unlawful discrimination in American society and to insist that our government be an effective tool for eradicating, not perpetuating, such injustice.

The Civil Rights Restoration Act of 1985, already cosponsored by much of the Senate, will restore the coverage of our four major civil rights statutes to what it was before the *Grove City* decision and clarify Congress's original intent that institutions whch receive Federal assistance must not discriminate against minorities, women, the disabled or the elderly.

The UAHC and the CCAR, the organizations I represent, are convinced that only congressional passage of the Civil Rights Restoration Act of 1985 comprehensively addressing all four statutes in their entirety—which the Dole bill does not—without substantive amendments that would change substantive law, can serve to restore our civil rights policy to its proper role. The express purpose of the act, to restore the coverage before *Grove City,* will be thwarted politically by efforts to expand or diminish the rights previously guaranteed under the law.

Now, as someone who works with coalitions in the Jewish community and has served as the chair of a number of interfaith coalitions, let me make it clear that the views that I represent here today are those which are the formal positions of the great majority of the organized religious community in America:

The National Council of Churches supports that views that I have expressed of passage without amendment.

I ought to point out, as the former chair of organizations involving the Baptist convention, that neither in 1985 nor in 1984 did they oppose this bill, although they did ask for changes on the religious tenet exemption. The Baptist Joint Public Affairs Committee, which is one of the great organizations struggling to preserve our religious liberties in this country, does represent the Southern Baptist convention here in Washington and its position is identical to that of the current position of the Baptist convention—it does not oppose this bill, although it would like to work in the legislative history and in the committee report to clarify aspects of religious liberty.

I think it is important and incumbent upon me to point out that the vast majority of national Jewish organizations take the view that I have espoused. In particular, the National Jewish Community Relations Advisory Council has voted to support S. 431 and to oppose any amendment which would change substantive law. Representing the major reform, conservative and orthodox Jewish congregational bodies, the major community relations organizations and 113 local Jewish community relations councils, this broad coalition is committed to the restoration of the pre-*Grove City* institutionwide coverage. This is also the position of the major umbrella organization of our social service providers, those groups that would be most affected by this legislation.

Several groups represented here today have proposed amendments which would change substantive law. Some of those suggested changes would be agreed to in theory by the organizations I represent; others we would oppose. Yet, even where we agree, we would oppose their inclusion here. In order to ensure passage of this vital legislation, other changes should be considered at a different time and in a different forum. We would, however, be in favor of adding language to clarify some of these concerns if such clarifications do not change the legislation substantively and can be legitimately addressed in the legislative history of S. 431, rather than in the form of an amendment that would change substantive law.

Additional amendments to this bill will serve only to weigh it down with rhetoric that is unnecessary or make substantive changes in the law. Regardless of the views of the groups represented here on the religious tenet exemption, or the abortion issue, we believe this is not the appropriate forum.

Let me point out in terms of Mr. Zweibel's testimony that we do support the change of the conforming amendment made on the House side that would make the exemption as broad in title IX as the coverage. That could be dealt with easily. But Pat Robertson's concern that issues like the Federal coverage arising through student aid or through veterans aid ought to be changed, is a substantive change in the law—not only from pre-*Grove City* but from post-*Grove* City—and that really ought to be dealt with in separate legislation.

Nothing in this law would change the status of religious groups. Let me conclude by pointing out and urging, Mr. Chairman, that you and your colleagues not fall victims to what I call the Tower of Babel syndrome. We have erected in this country a structure that preserves the rights of the American people; civil rights statutes that bring into the main stream of American legal and economic and social life millions of those who otherwise would be left out.

If we now try to build the perfect building, the structure that will reach the heavens, adding another room to deal with the affiliation issue, another with the integral issue, another with the educational institution issue, another with the when-life-begins issue, we will find ourselves using language that we do not understand and the entire structure will be destroyed by the weight of what we are trying to impose on it.

We have a structure here that represents the highest values of American life; let it be reaffirmed and reestablished by this Congress. In doing so we will further the values of this Nation and of the religious traditions represented here today.

Thank you very much.

[The prepared statement of Rabbi Saperstein follows:]

TESTIMONY

RABBI DAVID SAPERSTEIN

On behalf of the Union of American Hebrew Congregations
and the Central Conference of American Rabbis

Mr. Chairman, Members of the Committee,

My name is Rabbi David Saperstein. I am here today on behalf of the Union of American Hebrew Congregations (UAHC) and the Central Conference of American Rabbis (CCAR). I serve as the Co-Director and Counsel of their Religious Action Center in Washington, D.C. The UAHC represents 780 congregations and over 1.2 million Jews across the United States and Canada. The CCAR represents some 1400 Reform rabbis in those two countries. I would like to thank you for the opportunity to testify on behlaf of the Civil Rights Restoration Act of 1985 (S.431). We enthusiastically support the Restoration Act and strongly oppose all efforts to weaken this legislation.

The Jewish people are eternally linked to God's mandate that every person be granted equal rights and equal opportunities. The spirit of this belief is cogently reflected in the famous lines from the Midrash (ancient Rabbinic interpretations of the Hebrew scriptures) pointing out that when creating humankind, God first brought forth a single person, a person fashioned from the clay of all colors and all parts of the earth. This was done so that no people could ever say that "my people are better than yours."

Jewish history has a special sensitivity to oppression. In all too many countries, we have been the victims of discrimination and persecution. We know full well that so long as any minority can be subject to discrimination and deprived of equal rights and opportunities, then neither we nor any other minority is truly safe or secure. We are here today to reaffirm our profound commitment to the identification and removal of every instance of unlawful discrimination in American society and to insist that our government be an effective tool for eradicating - not perpetuating- such injustice.

The Civil Rights Restoration Act of 1985, already co-sponsored by ~~one-half~~ much of this Senate, will restore the coverage of our four major civil rights statutes and clarify Congress' original intent that institutions which receive federal assistance must not discriminate against minorities, women, the disabled or the elderly. The Restoration Act will make clear once again that institutions receiving federal monies must be required to abide by anti-discrimination laws in all areas of its activities, rather than only those for which federal assistance is specifically earmarked.

As you are well aware, these four civil rights statutes (1) Title IX of the Education Amendments of 1972; (2) Title VI of the Civil Rights Act of 1964; (3) Section 504 of the Rehabilitation Act of 1973; and (4) The Age Discrimination Act of 1975 have made a profound difference in our national life, bringing millions of minorities and women into the mainstream of American economic and social opportunity. Let us not renege now on the promise we have made to millions more of our citizens who seek similar opportunities.

The UAHC and the CCAR believe that only Congressional passage of the Civil Rights Restoration Act of 1985 comprehensively addressing all four statutes- without substantive amendments, can serve to restore our civil rights policy to its proper role. The express purpose of the Act - to restore the coverage of oure civil rights statutes will be thwarted politically by efforts to expand or diminish the rights previously guaranteed under the law.

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Our views are shared by the vast majority of national Jewish organizations. The National Jewish Community Relations Advisory Council has voted to support S.431 and to oppose any amendment which would change substantive law. Representing the major Reform, Conservative and Orthodox Jewish congregational bodies, the major community relations organizations and 113 local Jewish community relations councils, this broad coalition is committed to the restoration of the pre-Grove City institution-wide coverage.

Several groups have proposed amendments which would change substantive law. Some of the suggested changes would be agreed to by the organizations I represent; others we would oppose. Yet, even where we agree, we would oppose their inclusion here. In order to ensure passage of this vital legislation, other changes should be considered at a different time and in a different forum. We would, however, be in favor of adding language to clarify some of these concerns if such clarifications do not change the legislation substantively and can be legitimately addressed in the legislative history of S.431 rather than in the form of an amendment.

Additional amendments to this bill will serve only to weigh it down with rhetoric or make substantive changes to the law. Regardless of the views of the various groups represented here today on changing the current "religous tenet" exemption from religiously controlled institutions to religiously affiliated institutions, this would represent the kind of substantive change that should be addressed in a different forum. Regardless of our views on the religious freedom arguments inherent in preventing discrimination against women on the grounds of abortion, this is not the forum to resolve that issue.

It is important to note that as it is written now, S.431 does nothing to change the status of religious groups under the law. For example, in reference to two issues which have been discussed in recent months regarding this legislation, S.431 does not oblige any religious organization or hospital controlled by a religious group to perform abortions if to do so would violate the religious tenets of the organization; neither does it require religious groups to hire or admit people not of their faith.

As part of this discussion, however, it is incumbent upon us to reaffirm our belief that the Constitution does not grant immunity to religious groups from anti-discrimination laws. While there may be preference for those of the same faith, these laws would require that religious groups, like all others, refrain from discrimnating on the basis of race, sex, age or disability if they are to receive federal funds.

The Jewish community is committed to the principle that the law should state (as does S.431) that if you choose to receive Federal financial aid, you must comply with the anti-discrimination requirements of all four of these laws in your entire institution. Simply put, federal funds should not be used to subsidize discrimination. We hope the Senate agrees that our nation should settle for nothing less than that envisioned by President John F. Kennedy: "Simple Justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."

The CHAIRMAN. Thank you.

Senator Kennedy will submit questions and we will keep the record open for other members of the committee to submit questions. Let me ask one question: The present language of title IX; that is, the language as it was written before the *Grove City* case, covers only "education programs or activities." S. 431, however, reads to cover under title IX "all of the operations" of any institution conducting an education program or activity, including noneducation programs or activities.

Do you believe it is the intent of S. 431 to extend coverage this broadly or not? We will start with you, Mr. Saperstein, and then Dr. Flemming and then Ms. Atkins.

Rabbi SAPERSTEIN. Mr. Chairman, I believe that the House committee report and the bill that came out of it, clearly indicates that it applies only to educational institutions. Sponsors have so indicated that that was their intent of how to apply it and we believe it applied only to educational institutions. That was the way it was before *Grove City*; and that should be the principle now. It should not be expanded beyond that pre-*Grove City* status. Therefore, this fits into that category of the "clarifying language" in either the bill or in the committee report, that most of us who strongly support this bill and want swift passage would support.

The CHAIRMAN. Then you believe that all of the operational language in S. 431 does not mean what it says. Is that what you are saying?

Rabbi SAPERSTEIN. We regard it—I am speaking for my own organizations, I am talking about title IX now, only about title IX which applies only to educational institutions.

The CHAIRMAN. Mr. Flemming?

Rabbi SAPERSTEIN. Quite frankly, we would like to see it expanded some day. We believe this is not the appropriate bill on which we should do so.

The CHAIRMAN. All right. Mr. Flemming.

Mr. FLEMMING. Mr. Chairman, in the statement that I submitted for the record there is included this comment: While the education limitations for title IX remains in place so that only education programs or activities are covered, this bill retains the key principle that all activities of an educational institution are covered, and all educational activities of a noneducational institution are covered. To do less would deny women and girls in this country full protection against federally funded sex-based discrimination in education.

It is my understanding that this was the situation prior to *Grove City* and this would be the situation subsequent to the passage of this proposed legislation. Now, I agree that if there is any doubt about that, if clarifying language is needed, then it should be provided, or it should be cleared up in the committee report. The intent is as stated.

The CHAIRMAN. I fear that there is a lot of doubt about that.

Mr. FLEMMING. That is the kind of clarifying language that I think certainly should be considered by this committee and the House committee, so that we do get a meeting of minds on a basic issue of this kind. As I stated in my opening statement, the objective is to put us back where we were prior to *Grove City,* period, and some of us would not support anything else other than that.

The CHAIRMAN. I see. I think you can see, however, why some of us believe that the "all of the operations" language means "all of the operations".

Mr. FLEMMING. OK. That is a question of language that should be cleared up.

The CHAIRMAN. Thank you.

Ms. Atkins?

Ms. ATKINS. I do not want to be repetitive of what my colleagues have said, however, the "all the operations" language you cited falls in a definition—I do not have the language of the bill in front of me, but if my memory serves me correctly—"all of the operations" language falls within a definition of program or activity which is itself modified by the term "education." We had thought that would be sufficient to limit, to note that we are limiting the application of title IX to education programs. The House side has adopted some conforming amendments which we do not have opposition to, and I am sure you will have communication with the House body on that matter. We do not intend to broaden the scope beyond education programs in any way.

The CHAIRMAN. All right. Now, section 2 of S. 431 states, in part, "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation * * *." My question is: Does this "executive branch interpretation" include its abortion regulations? That was a major concern of some of the prior witnesses.

Rabbi **Saperstein**. The law as it was includes those. I think the Edwards amendment which makes no judgment for or against the regulations is helpful language, but the bottom line is S. 431 would return us to the status before. That does include those regulations.

You may want to change them—and we regard that as an appropriate public debate—but we also regard it as the wrong forum in which to try to impose that——

The **Chairman**. The problem is that the preface of the bill, the preamble, says Congress believes that those are the correct interpretations. There are many people who believe that those are incorrect interpretations. This disparity illustrates the problem of this possible looseness of the bill's language.

Ms. **Atkins**. I would like to respond to that.

The **Chairman**. I will be glad to have you do so in just a second. I would first submit to you that there is a lot of unclear ambiguous language in S. 431. There is no disagreement about the desirability of overruling *Grove City*, of returning title IX to institution wide coverage. Where you get disagreement is about the broad, expansive provisions of S. 431. And, as you know, those who testified earlier question just who it is who is making abortion the issue. I submit to you that, in fact, it is the loose language of this bill, of S. 431, which is raising the abortion issue.

Ms. Atkins.

Ms. **Atkins**. I would like to point out that the introductory material to the bill also discusses the reason that the legislation is being brought up, and again I do not have it in front of me so I cannot quote directly. Perhaps you can read it back, but it is due to the fact of the *Grove City College* decision and the problem that has arisen over what constitutes a program or activity in terms of receiving Federal financial assistance. I think you have to read that entire thing in context and realize that the long-standing executive branch interpretations that are being addressed by this bill are the long-standing executive branch interpretations as to what constitutes a program or activity, and what the breadth of coverage will be with respect to Federal financial assistance.

I would submit that the question of whether or not abortion is covered under title IX is an issue of what is discrimination under the law, not whether or not an institution is covered or what part of that institution is covered. So whether or not this bill does reaffirm those regulations I think is actually questionable and not obvious from the opening part of the bill.

However, I think if indeed the Senator would like to make clear that we are talking here only about *Grove City* legislation in S. 431, about restoration of the law with respect to what constitutes program or activity and the reach of Federal financial assistance and coverage, we might be able to talk about doing that alteration because that is what this bill is about, not what constitutes discrimination or what the remedies might or might not be under the law or various other kinds of things.

The **Chairman**. Would you be willing to take out that provision then?

Ms. **Atkins**. To take out that provision?

The **Chairman**. Yes.

Ms. Atkins. It seems to me that—well, I am not looking at the whole thing in context.

The Chairman. What you seem to be saying is, let us work on this bill, let us get the language refined and perfected, let us do what all of us would really like to do, to reverse *Grove City*.

Ms. Atkins. I am saying that there may be a way, without it in front of me I do not know, to further state that what we are trying to do here is to reverse *Grove City*, which dealt with a specific coverage problem and that that is what this language "long-standing executive branch interpretation" was intended to cover. That introduction was put in there, Senator Hatch, in order to avoid, in fact, the problems of other substantive issues which we all may disagree about. We were making a concerted effort to say we want to return to past practice. That is what that language was about.

The Chairman. I would like you to reread the bill and examine it carefully for what I and many others I consider to be loose language. Let us see what we can do to work together to resolve these problems. I am dedicated to doing that.

Mr. Flemming. Mr. Chairman, as you know, I was here all morning and I listened to all of the testimony that was presented to you this morning, and I tried to listen to it in the frame of reference of my own experiences in the Government. It seemed to me that the testimony brought out very clearly a desire on the part of some persons representing some organizations to effect a change in the existing title IX regulations. The witnesses were very frank about that.

That it seems to me clearly identifies the fundamental issue. Those regulations have been in effect for 10 years. They were promulgated in 1975, and if people have had unfortunate experiences with those regulations on that issue, the issue of abortion or any other issue, the way has been open to come to the Congress and ask the Congress to consider those regulations and to consider legislation that might have the effect of changing the regulations. However, no action along that line has been taken over a period of 10 years.

Now, at this point we are confronted with what I feel and I think many people feel is a very serious crisis in connection with the enforcement of our basic antidiscrimination laws. The legislation that is before you, S. 431, can deal with that crisis in an adequate manner, can get us back on the track. But if this committee and other committees of the Senate and the House are going to be asked to decide whether or not at this point they want to amend or to repeal some portion of the title IX regulations, it is clear that that raises a substantive issue on which reasonable people and committed people have sharp differences.

Now, I believe that if there is this feeling about the regulations, certainly this committee would be justified in conducting an oversight hearing to surface the nature of the complaints, to hear from the executive branch as to how they have actually administered the law, and then to decide whether or not it is necessary to consider any legislation.

I feel that under our form of Government, that way should be open to people, but I do not think that we should ask the victims of discrimination to stand by and wait while that process goes on—

because by its very nature it would be a rather long process—in fairness to people who have these deep-seated convictions on this particular issue.

I feel that in fairness to those who are the victims of discrimination, we should get our enforcement back on track and, as you have indicated, there really is not any disagreement with that particular objective. Out in the country, people are for it; within the Congress, people are for it, and as I tried to indicate in my statement, every day we delay on it, some minorities, some women, some handicapped, some older persons are going to be denied opportunities that they will never again be presented with, and those are the people that I feel for. That is the reason why I would plead with you and the members of the committee to consider this issue and get us back on the track. At the same time, arrange for an oversight hearing to give consideration to the other basic issue or issues that have been raised, a consideration to which, in my judgment, they are entitled.

The CHAIRMAN. I would like you to look at my religious exemption amendment. See if it satisfies your goals, achieves your purposes. It seems to me that the issues raised by this hearing are very important issues, and I feel particularly deeply about them. I also share your concern about our civil rights laws and ensuring that they are applicable across the board throughout our society.

We have examined only one aspect of the problem here today. There are numerous other questions which we will examine carefully, so that we can resolve these problems. They are problems that are on the minds of many people throughout our society.

I appreciate the testimony each of you has given the committee. I appreciate your willingness to look at this problem with us and to see its resolution. I believe all of us have that goal.

Last year, we came very close to having a bill that would have expanded the law beyond what it was 1 day before *Grove City* was decided. Yet we did not achieve that because many interest groups on one side or the other would not let the problem be resolved in that manner. I believe we all would have been much farther ahead had we so resolved this issue.

In closing, let me, without objection, say that we will keep the record open for additional statements and questions.

[Additional statements submitted for the record follow:]

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August 14, 1985

The Honorable Orrin G. Hatch
Chairman
Senate Labor and Human Resources Committee
U. S. Senate
Washington, D.C. 20510

Dear Chairman Hatch:

We are submitting this letter to you for its inclusion in the hearing record of July 17, 1985 at which the Labor and Human Resources Committee received testimony on the religious liberty aspects of civil rights legislation.

We believe our church body has a responsibility to provide guidance to its nearly 3 million members, including those who serve in our parish schools, colleges and other non-educational institutions, in order to assist their efforts as Christian citizens to work for the elimination of discrimination wherever it may exist in community, city. state, nation and world. We write to you, therefore, to express the general support of The Lutheran Church--Missouri Synod for the broad principles of non-discrimination incorporated in the two bills before the Committee, S. 431 and S. 272.

It is our conviction, however, that legislation addressing the civil rights of many must not include support for the right to abortion as a civil right. Because it is our Synod's position that as persons the unborn should stand under the full protection of the law for the right to life, we do not support the use of federal civil rights laws to force institutions to perform abortions or provide abortion coverage.

The amendment sponsored by Representative Tauke to H.R. 700, which is embodied in the House Education and Labor Committee version of H.R. 700, ensures that Title IX will not be interpreted as requiring abortion coverage in student, employee or other benefit programs of public or private institutions receiving federal funds. We urge the Senate Labor and Human Resources Committee to give positive consideration to including an "abortion neutralization" provision, such as the "Tauke amendment," as an important feature of revised civil rights statutes.

The Lutheran Church--Missouri Synod provides support to 12 colleges and two seminaries in the United States. These higher education institutions support the important guarantee of legislation for the full exercise of religious liberty for church-related schools. Because there has been confusion about the status of requests for exemption, any civil rights measure reported out of this Committee should offer needed clarification on the definition of religious control.

We believe these two provisions are needed to further strengthen the civil rights laws. We would be gravely concerned about the passage of revised civil rights legislation without their inclusion.

Please feel free to contact Candace Mueller at our Office of Government Information, Box 33216, Washington, D.C. 20033, Telephone: 293-3031 for further information.

Sincerely,

Ralph A. Bohlmann

Ralph A. Bohlmann
President

RAB:klk

c: Members of the Senate Labor and Human Resources Committee
Senator Robert T. Stafford
Senator Dan Quayle
Senator Don Nickles
Senator Paula Hawkins
Senator Strom Thurmond
Senator Lowell P. Weicker
Senator Malcolm Wallop
Senator Charles E. Grassley
Senator Edward M. Kennedy
Senator Claiborne Pell
Senator Howard M. Metzenbaum
Senator Spark M. Matsunaga
Senator Christopher J. Dodd
Senator Paul Simon
Senator John F. Kerry

PAUL SIMON
ILLINOIS

COMMITTEES:
LABOR AND HUMAN RESOURCES
JUDICIARY
RULES AND ADMINISTRATION

United States Senate
WASHINGTON, DC 20510

July 25, 1985

Honorable Orrin Hatch, Chairman
Committee on Labor
and Human Resources
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed a copy of a letter recently received from the Executive Director of the Baptist Joint Committee on Public Affairs. Mr. Dunn's letter of July 17, 1985, corrects several misimpressions left during the testimony of the Reverend Pat Robertson before the Committee on July 17 regarding the Civil Rights Restoration Act of 1985 (S. 431) and S. 272, the Civil Rights Act of 1985. I ask that you include Mr. Dunn's letter and the enclosure in the record of the July 17 hearing as I believe it makes a possible contribution to the Record we are developing for consideration of the post-Grove City College legislation.

If you have any questions, please have a member of your staff contact Bud Blakey on 47029 or 45484.

Cordially,

Paul

Paul Simon
United States Senator

PS/sp

Enclosure

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Kluczynski Bldg., 38th Floor
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3 West Old Capitol Plaza
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Suite 212
East St. Louis, IL 62203
618/398-7707

250 West Cherry
Room 115-B
Carbondale, IL 62901
618/457-3653

BB

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BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
200 MARYLAND AVENUE, N.E., WASHINGTON, D. C. 20002-5797 · 202/544-4226

JAMES M. DUNN
EXECUTIVE DIRECTOR

July 17, 1985

The Honorable Paul Simon
United States Senate
Washington, D.C. 20510

Dear Senator Simon:

According to a member of my staff who was present at today's hearing on Grove City legislation and religious liberty in the Senate Committee on Labor and Human Resources, Pat Robertson, of Virginia Beach, Virginia, misrepresented the position of the Southern Baptist Convention and the Baptist Joint Committee on Public Affairs with regard to pending civil rights legislation.

In point of fact, the 1984 resolution of the Southern Baptist Convention did not oppose the primary thrust of the Civil Rights Act of 1984. Rather it asked Congress either to redefine the term "recipients" in the Act or make certain the legislative history of the Act clearly exempted religious organizations, religious schools and institutions from being defined as recipients of federal financial assistance under the Act.

Indeed the concerns expressed in the resolution dealt only with what the Southern Baptist Convention feared might occur in the issuance of regulations implementing the Act without such clarifying language. Passage of the Act was, as you will note from the resolution's wording, presupposed.

Furthermore, Mr. Robertson was wrong in his stated assertion that the 1984 resolution "pretty much carries over" to 1985. Resolutions adopted by messengers (delegates) attending an annual meeting of the Southern Baptist Convention speak only for those attending that particular meeting and have no carry-over effect whatsoever.

Finally, Mr. Robertson was mistaken in telling the Committee, "The Baptist Joint Committee does not truly speak for the Southern Baptist Convention." As you will note from the enclosed copy of the 1984 resolution, the Baptist Joint Committee (along with the Southern Baptist Christian Life Commission) was specifically requested to notify Congress of the resolution. This is in fact a common procedure. Beyond the Baptist Joint Committee's clearly stated responsibility to convey this

AMERICAN BAPTIST CHURCHES IN THE U.S.A.
NATIONAL BAPTIST CONVENTION OF AMERICA
PROGRESSIVE NATIONAL BAPTIST CONVENTION, INC.
BAPTIST FEDERATION OF CANADA
NATIONAL BAPTIST CONVENTION, U.S.A.
SEVENTH DAY BAPTIST GENERAL CONFERENCE
BAPTIST GENERAL CONFERENCE
NORTH AMERICAN BAPTIST CONFERENCE
SOUTHERN BAPTIST CONVENTION

particular resolution to Congress, the Constitution of the Baptist Joint Committee describes the agency's scope and purpose as follows:

> The scope and purpose of the Baptist Joint Committee on Public Affairs shall be to act in the field of public affairs whenever the interests or rights of the national member bodies of Baptists which constitute the Baptist Joint Committee on Public Affairs (including the Southern Baptist Convention) call for conference or negotiation with the Government of the United States or with any other Governments, or whenever Baptist principles are involved in, or are jeopardized through, governmental action, or when any of the national member bodies of Baptists or any of their agencies may refer to the Baptist Joint Committee on Public Affairs any matter of common interest or concern, for consideration and recommendation. The Baptist Joint Committee on Public Affairs is empowered to enunciate, commend and defend the historic Baptist principle of religious freedom with particular application to the separation of church and state as embodied in the Constitution of the United States; to communicate and commend to the President, Congress, Courts and Departments of the Federal Government or state governments such declarations as Baptists from time to time officially adopt concerning public matters. . . .

This mandate from the Southern Baptist Convention and seven other national bodies of Baptists in the U.S. will clarify for the Committee the relationship of the Baptist Joint Committee to its sponsoring member denominations.

As to the current debate over S. 272 and S. 431, we are profoundly concerned that the religious liberties guaranteed by church-state separation not be put at risk by this legislation. Specifically, we appeal to the Congress to take steps to ensure that a religious institution will not be considered a recipient of federal financial assistance merely because it is tax exempt.

Sincerely,

James M. Dunn

JAMES M. DUNN

JMD/jh

Encl

Paul, I appreciate you and Tom Jefferson trying to keep Mr. Robertson honest about church-state separation.

STATEMENT OF THE
BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

on

S. 2568 -- The Civil Rights Act of 1984

to the

Committee on Labor and Human Resources
United States Senate

June 26, 1984

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These groups have a current membership of nearly 30 million.

Through a concerted witness in public affairs, the Baptist Joint Committee seeks to give corporate and visible expression to the voluntariness of religious faith, the free exercise of religion, the interdependence of religious liberty with all human rights, and the relevance of Christian concerns to the life of the nation. Because of the congregational autonomy of individual

Baptist churches, we do not purport to speak for all Baptists.

All of the Baptist groups which compose the Joint Committee have adopted formal statements in opposition to discrimination and regularly reaffirm those positions. Thus it is not a blanket opposition to the Civil Rights Act of 1984 which prompts this statement.

The problem which we have with the Act is the breadth of the definition of the term "recipient" as it relates to Federal financial assistance. In every instance in the bill "recipient" is defined as "any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity). . . ." By including "or other entity," the bill leaves open the probability that churches and the undertakings which are integral to the religious mission of those churches may be classified in administrative rules and regulations as recipients.

The Southern Baptist Convention in its annual meeting addressed this problem in a resolution it adopted on June 14, 1984:

ON THE CIVIL RIGHTS ACT OF 1984

> WHEREAS, The United States Congress is currently considering the Civil Rights Act of 1984; and
>
> WHEREAS, That Act, because of bipartisan support, will likely pass this summer; and
>
> WHEREAS, that Act seeks to clarify the application of

previous existing acts which prohibit discrimination on the basis of race, religion, sex, and age; and

WHEREAS, Many religious schools and exclusively religious organizations have scrupulously avoided direct federal financial assistance so that they could maintain independence from federal regulation and interference; and

WHEREAS, That Act, in defining organizations which are to be considered "recipients" of federal financial assistance includes categories which may be misleading and which could result in undue government intrusion in the affairs of religious organizations, religious schools and institutions.

Therefore, be it RESOLVED, That we, the messengers of the Southern Baptist Convention, meeting in Kansas City, Missouri, June 12-14, 1984 request Congress to give immediate attention either to redefining the term "recipients" in the Act itself or making certain that the legislative history of the Act clearly exempts exclusively religious organizations, religious schools, and institutions from being defined as recipients of Federal financial assistance under the Act; and

Be it finally RESOLVED, That the Christian Life Commission and the Baptist Joint Committee on Public Affairs be requested to notify the Congress of this resolution as soon as possible.

There are constitutionally valid reasons why churches and those organizations integral to their religious mission may find it necessary, as a requirement of sincerely held religious beliefs, to discriminate against people in their hiring practices. A denominational school must have the right to hire teachers in sympathy with the religious beliefs of the religious group which founded and supports the school. A church which for sincere theological reasons cannot ordain women to the priesthood may not be forced to do so by the state. A church must be in control of all of the elements of admission to membership and retention of the status of member in good standing -- even if it sets minimum age standards for membership. The list could go on, but the point has been made: even though the state has a firm anti-discrimination policy and the religious community may itself oppose discrimination, the First Amendment religion clauses require that government not forbid them to make some discriminations when religious beliefs require them to do so.

Therefore, we specifically request that, wherever the Civil Rights Act of 1984 defines the term "recipient," language be added explicitly to exclude exclusively religious organizations, religious schools, and agencies integral to the church's religious mission from the category of recipients of Federal financial assistance.

James M. Dunn

The CHAIRMAN. I thank each of the witnesses for being here. We will recess until further notice.

Thank you.

[Whereupon, at 1:15 p.m., the committee was in recess, to reconvene subject to the call of the Chair.]

PROPOSED GROVE CITY LEGISLATION, RELIGIOUS LIBERTY, AND PRIVATE EDUCATION

FRIDAY, SEPTEMBER 20, 1985

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:37 a.m., in Room SD-430, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman) presiding.

Present: Senators Hatch, Grassley, Thurmond, Weicker, Pell, Simon, and Dodd.

OPENING STATEMENT OF SENATOR HATCH

The CHAIRMAN. Ladies and gentlemen, this marks the second day of a series of hearings by the Committee on Labor And Human Resources to consider legislation proposed to overturn the Supreme Court's decision last year in *Grove City College* v. *Bell.*

These hearings are focused on S. 272, introduced by the distinguished Majority Leader, the Civil Rights Amendments Act, and on S. 431, introduced by the distinguished Ranking Members of this Committee, the Civil Rights Restoration Act.

During the first hearing, this Committee heard testimony on various religious liberty issues raised by the proposed legislation. The eight principal concerns about religious liberty are briefly summarized on a sheet that has been distributed.

During the present hearing, we will move on to a separate, albeit related issue, the implications of the proposed legislation for private educational institutions. In future hearings, we will focus such issues as the impact of the proposed bills employment and the private sector and State and local governments.

Last year I introduced two amendments to pending civil rights legislation. Both amendments pertained to private educational institutions. I have reintroduced both during the present Congress as amendments to the civil rights legislation proposed this year to reverse *Grove City.*

The first, which was the subject of some discussion during our opening day of hearings, would introduce an effective religious liberty exemption into title IX, thereby allowing private colleges to maintain religiously-based policies in such areas as abortion, residences, dress codes, and curricula, even if these policies conflict with title IX rules and regulations. The second amendment would partially overturn part I of the *Grove City* decision by exempting from title IX coverage colleges which do not practice discrimination, which receive absolutely no Federal assistance, and whose only connection to the Federal Government is the attendance of individuals who receive Federal scholarship assistance or GI benefits.

Ladies and gentlemen, we have an outstanding group of witnesses for our hearing today. They have a variety of perspectives on the proposed bills. I welcome each of them and wish to express the appreciation of the entire committee for their attendance this morning. I might also add that we have tried to make these hearings reflect the views of both those who support and those who do not support the particular bills at issue.

Let me turn now to Senator Thurmond. Senator Thurmond is the Chairman of the Judiciary Committee and has an immense interest in this issue because of his extensive knowledge of the law on civil rights issues. So Senator Thurmond we will turn to you for your questions and comments.

Senator **THURMOND**. Thank you very much, Mr. Chairman.

Mr. Chairman, it is a pleasure for me to be here today as the Committee On Labor And Human Resources continues its study of the issues and legislation relating to the Supreme Court's decision in the case of *Grove City* v. *Bell.*

Mr. Chairman, as I have said before, the controversy surrounding the Grove City related legislation has been improperly focused. The question is not whether or not Federal financial assistance should be allowed to fund discriminatory activities. Indeed, I believe that Americans support the continued prohibition of such use of Federal funds.

The true controversy underlying this legislation is based upon far more complex yet subtle questions which arise in the implementation of this accepted policy goal.

It is here that a number of significant disagreements exist. What breadth of coverage should be invoked as a result of receipt of Federal funds by a particular entity. As a result of receipt of Federal funds by a particular entity, what surely should not qualify as Federal financial assistance. How is discrimination to be defined? To what extent should religiously-oriented institutions be exempted if violations of religious tenets are required by law, and how are such institutions to be identified?

We find ourselves considering this matter today, in part, because the current laws which prohibit the use of Federal funds to support discrimination are not explicit in answering the foregoing and other important questions.

I state this despite some strong beliefs of my own as to what was intended by Congress in enacting the standing laws.

If Congress is to revise title IX, or other anti-discrimination statutes, it should do so responsibly, leaving as little to agency and judicial interpretation as possible.

I want to commend you, Mr. Chairman for holding these hearings, to ensure that these important issues are addressed responsibly.

We have a distinguished group of witnesses with us today and I will look forward to reading their testimony. I have conflicts that will prevent my being here for the testimony but it will be a pleasure to read it later. Thank you very much.

The CHAIRMAN. Thank you, Mr. Chairman. We appreciate your regular attendence at these hearings. I note that Senator Simon, the distinguished Senator from Illinois, is here. We will turn to you at this time, Senator.

Senator SIMON. Thank you, Mr. Chairman. I have no prepared statement. I am very much interested in this subject and look forward to receiving some wisdom from the witnesses and from you, Mr. Chairman.

The Chairman. Thank you so much. We will be very happy to give some, if we can. There are those who believe that I cannot deliver any wisdom on any subject, let alone this one. But I shall try. I am sure that our witnesses, at least, will be most helpful.

We have two distinguished panels of witnesses today. We will call the first panel at this time. It consists of Dr. Bruce Hafen, Dr. Charles MacKenzie, and Dr. Lewis Nobles. If you three will take your seats with you on the right, Dr. Hafen, Dr. MacKenzie in the middle, and Dr. Nobles on the left please.

Dr. Bruce Hafen has been the president of the American Association of Independent Colleges and Universities. He has only recently departed as the president of Ricks College in Rexburg, ID, to become Dean of the School of Law at the Brigham Young University. Dr. Charles MacKenzie is the president of Grove City College in Grove City, PA. Dr. Lewis Nobles is the president of Mississippi College in Clinton, MS, and today is representing the American Association of Southern Baptist Schools and Colleges.

We will introduce our second panel of three witnesses as soon as this panel has concluded its presentation and when our questions to them are concluded.

Dr. Hafen, we will start with you.

STATEMENT OF DR. BRUCE HAFEN, DEAN OF J. REUBEN CLARK LAW SCHOOL, BRIGHAM YOUNG UNIVERSITY, PROVO, UT; DR. CHARLES MacKENZIE, PRESIDENT, GROVE CITY COLLEGE, GROVE CITY, PA; AND LEWIS NOBLES, PRESIDENT OF MISSISSIPPI COLLEGE, REPRESENTING AMERICAN ASSOCIATION OF SOUTHERN BAPTIST SCHOOLS

Dr. HAFEN. Thank you, Senator Hatch. Mr. Chairman, and members of the committee, I appreciate the opportunity of appearing before you.

I am here in my capacity as president of the American Association of Presidents of Independent Colleges and Universities.

The Chairman. Doctor, if I could interrupt you for a second. We would like you to summarize, if you can as our time is limited. We will put all written statements in the record as though they were fully delivered. Thus, to the extent that you can summarize, we would appreciate it because it will give us more time for questions.

Dr. HAFEN. Thank you. I will be excerpting a few sections of my written testimony. I am glad to have it in the record. I am also the Dean of the Brigham Young University Law School, having just completed a 7-year term as president of Ricks College, a private 2-year college in Idaho enrolling over 6,000 students.

My association includes the presidents of some 165 private colleges and universities from 40 different States with a total enrollment of about 330,000 students.

Some of these are large universities, such as Baylor, Villanova, and Brigham Young. However, most are small colleges with enrollments under 2,500.

Many of our schools are church related, representing numerous denominations. All of our schools are strong, reputable, academic institutions that are deeply committed to the goals of nondiscrimination and equal opportunity in higher education.

In general, our schools are distinguished from other private and public colleges and universities by their determined efforts over many years to finance their operations totally from the private sector.

About 60 percent of our schools receive no direct Federal aid. A principal motivation for this self-reliance has been an intense desire to remain independent of governmental control in order to pursue distinctive educational missions.

However, nearly all of our schools admit students who receive Federal assistance. Because of this fact, under S. 272 or S. 431, these private schools will be considered recipients of Federal assistance and subjected to institutionwide coverage of their educational affairs because they enroll students who receive student aid.

How ironic it is for these college presidents to realize today that if either bill is passed, they will be as completely overwhelmed by Federal regulation as if they had applied for and received the maximum possible Federal assistance over all these years.

I am primarily concerned today about the bills' effect of broadening the application of title IX to private colleges which receive no direct Federal funds and which, in many cases, also have an explicitly religious, educational mission.

I strongly urge that you adopt amendments to the proposed legislation in two areas—student aid and religion.

You may know that effective amendments on these two subjects were introduced a few weeks ago before the House Committees on the Judiciary and Education and Labor, where both amendments were the subject of close votes, and the religious tenet exemption was adopted by the Education and Labor Committee.

I am heartened by this early congressional action and urge that your committee give even greater attention to these issues. Even though the amendments we propose affect a relatively small number of colleges, they involve very important principles. In the interest of time, Mr. Chairman, I will comment on these two amendments rather than making a more general statement about the bill. There are some more general comments in my written testimony.

First, on the need for a religious exemption that is broader than what now exists in title IX.

I consider it fortuitous that the emotional issue of abortion has finally come into focus in the current debate over this legislation because that issue illustrates so powerfully the adverse impact of a broadened version of title IX on churches and church-related schools.

Many significant and legitimate religious interests, of which abortion is only the most visible example, are seriously threatened by the absence of a religious exemption in title IX broad enough to match the new breadth of regulation contemplated by S. 272 or S. 431.

Colleges with a religious orientation have a peculiar set of difficulties with being forced into the mold of State schools. Governmental regulation of matters touching directly upon such a school's educational and religious mission as title IX does, changes the essential character of the school from being a private institution to being a quasi-public one.

Once that line is crossed, there is no turning back from future attempts to impose all the tangled, contemporary assumptions about separation of church and state upon the campuses of church-related schools.

As originally enacted, title IX contained a narrow religious exemption applicable when the law conflicts with a religious tenet in a college that is controlled by a church. Even if that exemption protected some church-related colleges when first enacted, the actual pattern in church-related higher education today makes the exemption rarely available.

Many church-related colleges have lay boards of trustees, diverse funding sources, and only informal denominational affiliations.

Religiously oriented schools not literally controlled by churches are clearly entitled, by the Constitution, to protection of their religious liberty interests.

An amendment is needed to broaden this exemption to include schools having obvious religious missions or meaningful affiliations with churches.

My written statement expands more fully on the reasons why religious liberty needs protection under any amendment, or any new legislation.

Turning now to the indirect student aid amendment, this is the second area needing correction in any post-Grove City legislation. I focus particularly on the treatment of non-campus-based student financial aids such as Pell grants as a source of Federal jurisdiction under title IX.

It appears not to be widely understood that Pell grants are applied for by and awarded directly to students, based on the satisfaction of personal criteria.

The schools do not select the student recipients and the schools are not conduits for Federal funds granted to students.

Moreover, when a student receives a Pell grant, the student may spend that money for a variety of education-related expenses, from food and lodging to tuition.

Costs other than tuition are often high enough in relation to grant amounts to consume all of a student's Federal funds, and such costs may be incurred off campus.

Thus, when a student on a Federal grant pays his or her tuition, it is by no means clear that the tuition is being paid from Federal sources rather than the student's own funds.

The reality is of course that student aid is to students, who are the primary intended beneficiaries of student aid programs.

It is simply incorrect to assume, as many do, that student aid flows directly into the operating budget of a college. Schools do indirectly benefit when students are helped financially to attend college, but no more so than endless other parties who may receive payments for their goods and services from recipients of general governmental assistance, without thereby being classified themselves as recipients.

Only when Congress responds to this point will economically disadvantaged students be able to attend all independent colleges, since some of these colleges have already begun to refuse admission to students who bring Federal control as the price of their enrollment.

There is a sad irony in realizing that in this sense, these two bills will both reduce the equal education opportunities of those most in need of Federal assistance.

My concerns about the theory of indirect assistance, as we see in student aid, have some broader ramifications, especially as I consider S. 431.

It surprises me that some people assume Congress has always intended to establish regulatory jurisdiction through the spending power over all private entities that have business dealings with individuals who receive Federal funds.

Last year's proposed Civil Rights Act of 1984 applied the student assistance recipient analogy to an endless variety of circumstances and transactions.

S. 431 seems similarly to include all indirect beneficiaries through its subpart 4, which very broadly requires consistent coverage among all public and private entities.

To be consistent, the line between direct and indirect benefit must be the same for noneducational entities as it is for student aid.

The list of public and private sector activities that will become subject to unprecedented Federal regulation through this concept is endlessly long and complex.

Suppose a student on a Pell grant pays for rent, or automobile repairs with a portion of his grant funds. Does that make recipients of the landlord and the repair shop, or will the answer depend on whether the student needed an apartment or an automobile in order to attend college?

If a hospital becomes a recipient of Federal assistance by accepting fee payments from individual Medicare patients, does that also create recipient status for an independent contractor which provides respiratory therapy services for the hospital?

These are not far-fetched examples. The Fifth Circuit Federal Court of Appeals recently found recipient status in the hospital case just cited because it relied heavily on the student aid analogy contained in the Supreme Court's *Grove City* opinion. That portion of the opinion might have made sense in a pragmatic way as it was combined with a narrow view of program or activity. Under a broader reading with campuswide coverage, the student-aid issue needs to be addressed.

The recipient coverage issue was also discussed at length in the debates over the enactment of title VI of the Civil Rights Act in

1964. The legislative history is abundantly clear, that Congress rejected the indirect benefit theory.

As stated, for example, by Senator Humphrey:

> It is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs.

It should also be noted that the blurring of direct and indirect forms of governmental aid, combined with the idea of campuswide coverage, may force termination of student aid at some church-related colleges because the aid may be an unconstitutional establishment of religion.

Governmental aid to religious schools is constitutionally allowable so long as only secular activities are funded. But if an entire institution is now deemed a recipient when an aided student enrolls, it may be impossible to show that the student aid is used exclusively for secular purposes. Students are not required to pay tuition with their grant funds.

They also comingle grant and personal funds in paying all kinds of expenses incidental to their education on and off campus.

The governmental entanglement involved in trying to monitor and trace funds amid such complexities may itself violate the establishment clause.

Such difficulties do not exist under current legal interpretation, since the recipient student financial aid office has an obviously secular purpose.

This problem simply underscores the reality that student aid is to students, and student aid alone would not violate the establishment clause.

What is a private college? Is a private college an extension of the State, which has no lawful power to teach its own officially adopted value orientation?

Or is a private college an extension of the parents who enroll their children as its students, and who we fully expect to adopt an explicit value orientation?

The answer to these questions may well depend on our view of the spending power, or more specifically, our view of the nature of Federal financial assistance to students. The precise issue is whether one student receiving a Pell grant can, by the act of enrolling, change the essential character of an independent college from being an extension of the private; parental sphere to being an extension of the State?

To clarify that question and to preserve the private independent sector, title IX should be amended, to exclude from its definition of recipient these colleges receiving no direct Federal assistance and whose students receive no campus-based benefits.

Such an amendment has been proposed by Senator Hatch in the Senate and a similar amendment has already been proposed in the House of Representatives.

As I say it was the subject of a very close vote there. I hope that similar scrutiny will be given here to a very important subject. Thank you very much.

[The prepared statement of Dr. Hafen follows:]

TESTIMONY OF

BRUCE C. HAFEN

PRESIDENT, AMERICAN ASSOCIATION OF PRESIDENTS
OF INDEPENDENT COLLEGES AND UNIVERSITIES AND
DEAN, BRIGHAM YOUNG UNIVERSITY LAW SCHOOL

BEFORE THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
AND THE CONSTITUTION SUBCOMMITTEE
OF THE SENATE COMMITTEE ON THE JUDICIARY
CONCERNING
S.431, "THE CIVIL RIGHTS RESTORATION ACT OF 1985"
AND
S. 272, "THE CIVIL RIGHTS AMENDMENTS ACT OF 1985"

September 20, 1985

I. INTRODUCTION

Mr. Chairman and members of the Committees, I appreciate the opportunity of appearing before you. I am here in my capacity as President of the American Association of Presidents of Independent Colleges and Universities (AAPICU). I am also the Dean of the Brigham Young University Law School, having just completed a seven-year term as President of Ricks College, a private coeducational two-year college in Idaho enrolling about 6,200 students.

A. Description of AAPICU

My association includes the presidents of some 165 private colleges and universities from 40 different states, with a total enrollment of about 330,000 students. (A membership list is attached.) Some of these are large universities, such as Baylor, Villanova and Brigham Young. However, most are small colleges with enrollments under 2,500. Many of our schools are church-related, representing numerous denominations. All of our schools are strong, reputable academic institutions that are deeply committed to the goals of nondiscrimination and equal opportunity in higher education.

In general, these schools are distinguished from other private and public colleges and universities by their determined efforts over many years to finance their operations totally from the private sector. About 60% of our schools receive no direct federal aid. A principal motivation for this self-reliance has been an intense desire to remain independent of governmental control, in order to pursue distinctive educational missions. However, nearly all of our schools admit students who receive federal assistance. Because of this fact, under S. 272 or S. 431, these private schools will be considered recipients of federal assistance and subjected to institution-wide coverage over their educational affairs. How ironic it is for these college presidents to realize today that, if either bill is passed, they will be as completely overwhelmed by federal regulation as if they had applied for and received the maximum possible federal assistance over all these years.

I am primarily concerned about the bills' effect of broadening the application of Title IX to private colleges which receive no direct federal funds and which, in many cases, also have an explicitly religious educational mission. I strongly urge that you adopt amendments to the proposed legislation in two areas — student aid and religion. You may know that effective amendments on these two subjects were introduced a few weeks ago before the House Committees on the Judiciary and Education and Labor, where both amendments were the subject of close votes, with a religious tenet exemption amendment being adopted by the Education and Labor Committee. I am heartened by this early Congressional action, and urge that your Committees give even greater attention to these issues. Even though the amendments we propose affect a relatively small number of colleges, they involve very important principles.

B. Defining the Limits of Regulatory Power

Some of the sponsors of the subject legislation say their goal is to ensure that no one in the country is "free to discriminate," or, that no federal dollars are to be used "to subsidize discrimination." Let it be remembered that these bills have not been introduced because of new evidence of discrimination on American campuses or elsewhere. There was no allegation or charge — let alone a finding — of discrimination in the Grove City case.

Moreover, these generalizations obscure the need for clear-headed debate about a terribly important question: where to draw the line that limits federal power. What does "subsidize" mean? The economic impact of federal spending and taxation policies is so pervasive in contemporary society that at least one party to almost every daily financial transaction is to some extent "subsidized" or at least "benefitted" financially by the government. What does "sex discrimination" mean? Some would argue that any distinction based on gender is discrimination. Did Congress engage in invidious discrimination when it enacted the law exempting women from registering for the draft? Does Title IX as it now reads wrongly discriminate on the basis of sex when it exempts from its coverage traditionally single sex-colleges, military academies, the YMCA, and the Girl Scouts?

As these examples suggest, there has always been some kind of line between activities that should be regulated by government and activities that should be left alone. No one has yet seriously suggested that civil rights laws should monitor every private, individual choice. Thus, S. 272 and S. 431 present Congress with the crucial issue of when -- and according to what rational principles -- federal subsidies should and when they should not trigger the massive power of regulatory jurisdiction.

We are past the stage in our national experience with anti-discrimination laws when the debate can be understood only in terms of who supports and who opposes civil rights. Those who support any cause having constitutional overtones are likely to fly the flag of civil rights, because it is difficult to oppose so potent a label. Thus, some anti-abortion leaders have recently been recasting their arguments in civil rights terms, describing the unborn as the last disenfranchised minority group. Others seek to regulate pornography as a violation of the civil rights of women. Others claim the Grove City legislation must give more deference to religion -- precisely because religious liberty is also a civil right.

Consider now the factual circumstances and the policy implications of the way these two bills draw the lines of federal jurisdiction as applied to educational institutions. Nearly all American colleges and universities receive a variety of direct federal aid. If Congress wishes to enact a new law providing for campus-wide regulatory coverage for these institutions, that is not, in fact, a terribly large extension of federal jurisdiction, since so many educational programs and activities are already receiving federal assistance. Nevertheless, the change from program-specific coverage to institution-wide coverage is indeed a substantive change in the statutory theory. I believe the Supreme Court correctly interpreted the scope of coverage issue in the Grove City case, as did virtually every other federal court decision prior to that case, overruling consistently the broader interpretations that had been attempted by some federal agencies.

S. 272 and S. 431 are said to do nothing more than "restore" the enforcement authority of Title IX and other civil rights laws to their pre-*Grove City* status. A key definitional statement from S. 431, for example, says the term "program or activity" originally used by Congress will now mean "*all* of the operations" of an "entity" receiving federal assistance -- which is a good deal like saying that although Congress originally said "tree," the meaning of tree must be "restored" to mean "forest." Congress can obviously change its mind, but I would hope a real statutory change could be understood for what it is, rather than being presented as no change at all.

In the case of those schools receiving no direct federal aid, however, the enactment of either bill will establish by statute a far-reaching new theory about the scope of federal power: *the theory of indirect benefit as a basis for institution-wide coverage*. Historically, regulations based on the spending power applied only to *direct* recipients of federal aid. But in the second part of its *Grove City* holding, the Supreme Court adopted the idea that federal aid to students is aid to the institutions they attend. That seemed like an acceptable pragmatic compromise when combined with the Court's narrow view of "program or activity," because it limited federal regulation to the student financial aids office in the case of schools receiving no direct aid.

The bills before you, however, will create campus-wide or even system-wide regulation if one student on a federal grant enrolls at a college which itself receives no federal funds. Apart from the problems this creates for colleges which have for years refused federal aid in order to remain free of intrusive regulation, its larger significance is in extending federal authority to the powerful new beachhead of indirect benefit. With student aid as the landing craft, the theory will be in place to regulate private grocery stores whose customers pay with food stamps or private hospitals whose patients pay with medicare funds. The next natural step will be regulation of all private schools that benefit indirectly from voucher systems or tuition tax credits. Then the stage will be set for the really big assault: the conditioning of federal tax exemptions for all educational or charitable institutions on compliance with federal policy regarding gender-based distinctions — regardless of defenses based on the civil right of religious liberty.

In addition to identifying student aid as a major issue, this line of reasoning underscores the importance of considering the meaning of religious liberty as a limitation on federal authority at the time new legislation is being considered. Thus, either S. 272 or S. 431 must be amended in order to first, strengthen the religious exemption now in Title IX and, second, to exclude certain forms of indirect student aid from the applicable definitions of federal assistance.

II. SEX DISCRIMINATION POLICIES AND VALUE-ORIENTED HIGHER EDUCATION

Laws prohibiting racial discrimination are now in place with an unquestionable basis of support in both social policy and constitutional law. Laws forbidding other forms of discrimination by governmental entities are similarly well-founded. However, when the focus of civil rights legislation shifts away from both race and state action, the policy and constitutional foundations become less secure. This is primarily due to the presence of other protected social and constitutional values that legitimately compete with the values of non-discrimination in areas where neither race nor state action is involved. Serious practical and theoretical problems arise when legal concepts developed in the context of race and/or state action are uncritically transferred to other circumstantial categories involving private action. Yet, the extreme advocates of gender equality seek to accomplish just such transfers.

A. Religious, Moral, and Family Values

The significance of religion, moral values and family life as matters of national priority is threatened by the single-issue mentality that motivates the most ardent advocates of gender equality. These advocates increasingly argue that the elimination of actual sex discrimination is an insufficient goal of federal civil rights policy. Rather, they insist we must eradicate all social or institutional attitudes in both the public and private sectors which reinforce female-male distinctions of any kind.

Surely we must remedy actual discrimination in educational, legal, or other environments. But to eliminate all cultural sources of distinctions based on gender is quite another matter, creating problems at least as serious as the ones we are trying to solve. For instance, American society has experienced in recent years a steady erosion of social and legal support for the concept of formal marriage, which has contributed toward increasingly unstable family structures. The most serious harm caused by such instability is inflicted on children, whose developmental needs for continuity and stability are well documented. A persuasive case can be made that a vigorous public campaign is urgently needed to restore support throughout the social and legal structure for the social interest (call it the civil rights of children) in stable family and kinship patterns. Such a campaign would clearly collide with the goal of eliminating all cultural sources of gender distinction.

Consider another example of what happens when race discrimination concepts are uncritically transferred to the sex discrimination area. The Fair Housing Act, one of the original race discrimination laws, was amended a few years ago by simply adding "or sex" to the statute. Shortly afterward, a single female was refused rental accommodations in a student apartment building because of a requirement by Brigham Young University that single students living off campus reside in sex-segregated buildings. After reviewing the woman's complaint, the Justice Department announced its intention to bring suit. However, when the public media realized that such enforcement of federal sex discrimination laws appeared to require single men and women to share apartments and bedrooms, the roof of public outcry fell in on the Justice Department. An agreement was finally reached which allowed sex-segregated housing at educational institutions, if established "on the basis of religious or moral principle." (Call it religious liberty — a civil right.)

These examples suggest that widely supported religious and moral values can be adversely affected by the indiscriminate application of laws developed in the racial context to circumstances arising in the gender context. It also portrays a major civil rights law that still makes no statutory provision for exceptions of the kind demanded by common sense and discretionary enforcement authority. Title IX has similar problems.

B. Private Higher Education

Another major area representing public policy values which can be adversely affected by overly broad regulatory policies is private higher education.

1. **Educational Diversity**. Some people today may assume the only reason a private school would pursue an independently defined mission is to cover up some kind of invidious discrimination. That idea would not be seriously entertained by those who know, even superficially, the history of education in this country or the theory of democratic pluralism on which our entire political system rests. Our educational system — especially at the level of higher education — has long reflected and cherished the diversity that is so natural and so healthy in a democratic system. For centuries, the landscape of U.S. higher education offered a rich variety of colleges and universities, each a one-of-a-kind reflection of the unique vision of its founders. Many were founded by churches seeking to provide a well-grounded education within the context of their religious principles. Different schools had different characters.

This diversity manifested a deeply-held idea that individuals and institutions should be permitted to pursue the goals of education in their own ways. There were single-sex colleges, religious colleges, secular colleges, vocational institutes, and pure liberal arts institutions. Which of these approaches is correct? The government of the United States does not know, nor should it try to decide with finality. Like the economic marketplace, the marketplace of ideas is well-served by divergent approaches and brisk competition. In addition to offering the consumer a wide array of choices, the competitors learn from one another and the entire marketplace is improved. Perhaps more significantly, the variety and individual integrity of such diverse approaches comes close to the heart of the nation's cherished belief that each man or woman should be free to define the meaning and purpose of his or her own life. That freedom includes a student's right to choose his or her own approach in a college education.

2. Church-related Schools. I consider it fortuitous that the emotional issue of abortion has finally come into focus in the current debate over this legislation, because that issue illustrates so powerfully the adverse impact of a broadened version of Title IX on churches and church-related schools. Many significant and legitimate religious interests, of which abortion is only the most visible example, are seriously threatened by the absence of a religious exemption in Title IX broad enough to match the new breadth of regulation contemplated by S. 272 and S. 431. Colleges with a religious orientation have a peculiar set of difficulties with being forced into the mold of state schools. Governmental regulation of matters touching directly upon such a school's educational and religious mission (as Title IX does) changes the essential character of the school from being a private institution to being a quasi-public one. Once that line is crossed, there is no turning back from future attempts to impose all the tangled contemporary assumptions about the separation of church and state upon the campuses of church-related schools.

Church colleges and universities, freely chosen as private institutions by the students who attend them, have traditionally regarded attitudes about marriage, children and family life and related value questions as central to the concerns of their students. Thus these schools have, as matters of both educational and religious philosophy, played a vital role in augmenting their students' own family and religious life in the process of value formulation and value transmission regarding family-oriented matters. In this sense, church schools act very differently than public schools because state schools are extensions of the democratic state -- which has a constitutional obligation to take a more "neutral" posture on value-laden matters.

Yet, Title IX, as proposed now to apply campus-wide, would tend to establish in private as well as public schools an official orthodoxy about value questions relating to the roles of the sexes in society, matters of sexual morality, abortion, and attitudes about marriage and family life. This action is an inappropriate intrusion on the civil right of religious liberty.

As originally enacted, Title IX contained a narrow religious exemption, applicable when the law conflicts with a religious tenet in a college that is "controlled" by a church. Even if that exemption protected some church-related colleges when first enacted, the actual pattern in church-related higher education today makes the exemption rarely available. Many church-related colleges have lay boards of trustees, diverse funding sources and only informal denominational affiliations. Religiously oriented schools not literally "controlled" by churches are clearly entitled by the Constitution to protection of their religious liberty interests. An amendment is needed to broaden this exemption to include schools having obvious religious missions or meaningful affiliations with churches.

A statutory amendment would also protect religious interests against policy fluctuations in federal agencies left with vague present statutory guidance. Despite the sensitivity and significance of religious liberty issues, the Department of Education has been uncertain how to interpret and administer the current religious exemption. Thus, in amending the current exemption, Congress should also direct federal agencies to interpret the exemption broadly enough to be consistent with the First Amendment. Governmental agencies should avoid the role of determining the nature and meaning of religious doctrines. Good faith claims by educational institutions having a bona fide religious mission should be entitled to a presumption of validity, and doubts about the presence and/or meaning of a religious tenet should be resolved in favor of the educational institution.

III. INDIRECT STUDENT AID

A. Student Aid and "Recipient" Status

A second major area needing correction in any post-Grove City legislation is the treatment of non-campus-based student financial aid, such as Pell Grants, as a source of federal jurisdiction under Title IX.

The Education Department's original Title IX regulations took the position that an institution is a recipient when a student accepts financial aid, evidently on the theory that when an institution indirectly benefits from aid to one of its patrons, the result is the same as with direct institutional aid. That theory contradicts some very important legal principles which are well established in other contexts, including those that allow tax exemptions to all charities and those that have allowed aid to parochial schools without amounting to an establishment of religion. It also contradicts the legislative history of Title VI, which the Supreme Court has said may be "crucial to an understanding of congressional intent in 1972 when Title IX was enacted. . . ." Nevertheless, the Education Department's position on the definition of "recipient" in Title IX was ultimately upheld as a matter of statutory interpretation by the Supreme Court in the Grove City case last year. This portion of the Grove City ruling needs to be corrected by congressional action, especially if the "program or activity" limitation is broadened as proposed.

The impact of this portion of the Court's holding was moderated for schools like Grove City College by the Court's further determination that statutory coverage must be limited to the school's financial aids program. The majority's resolution of the two issues of "recipient" and "program specificity" could be viewed as a fair result — something of a compromise -- in the unique case of a private school which receives no other federal aid. If either proposed bill is enacted, however, the "compromise" will end. Hence there is a need to consider the unique problem of the college that has contact with federal funding only through student aid.

"Indirect" educational assistance in the form of benefits to students or their families has long been distinguished from "direct" benefits to schools in the context of Supreme Court cases dealing with aid to parochial schools. The distinction has often been a crucial one, as indirect benefits are the only kind to have withstood Establishment Clause challenges. (See, e.g., Mueller v. Allen.)

Higher education grants to students are clearly of this indirect type. This is especially true in the case of ADS Pell Grants. Pell Grants are applied for by and awarded directly to students based upon the satisfaction of personal criteria. The schools do not select student recipients nor are the schools conduits for federal funds granted to students. Moreover, when a student receives a Pell Grant, the student may spend the money for a variety of education-related expenses, from food and lodging to tuition. Costs other than tuition are often high enough in relation to grant amounts to consume all of a student's federal funds, and such costs may be incurred off campus. Thus, when a student on a federal grant pays his or her tuition, it is by no means clear that the tuition is being paid from federal sources rather than the student's own funds. The reality is, of course, that student aid is to students, who are the primary intended beneficiaries of student aid programs. It is simply incorrect to assume, as many do, that student aid flows directly into the operating budget of a college. Schools do indirectly benefit when students are helped financially to attend college, but no more so than endless other parties who may receive payment for their goods or services from recipients of general government assistance without thereby being classified themselves as recipients.

Only when Congress responds to this point will economically disadvantaged students be able to attend all independent colleges, since some of these colleges have already begun to refuse admission to students who bring federal control as the price of their enrollment. Two of our member schools, Hillsdale College and Grove City College, have announced such a policy. There is a sad irony in realizing that, in this sense, S. 272 and S. 431 will reduce the equal educational opportunities of those most in need of personal federal assistance.

B. Limitations on "Spending Power" Authority

My concerns about the theory of "indirect assistance" have some broader ramifications, especially as I consider S. 431. It surprises me that some people assume Congress has always intended to establish regulatory jurisdiction through the spending power over all private entities that have business dealings with individuals who receive federal funds. Last year's proposed Civil Rights Act of 1984 applied the student assistance "recipient" analogy to an endless variety of circumstances and transactions, including grocery stores that receive food stamps, apartment owners receiving rent from federally subsidized tenants, or private hospitals whose patients pay with medicare funds. S. 431 seems similarly to include all indirect beneficiaries through sub-part (4), which very broadly requires "consistent coverage" among all public and private "entities." To be "consistent," the line between direct and indirect benefit must be the same for non-educational entities as it is for student aid. The list of public and private sector activities that will become subject to unprecedented federal regulation through this concept is endlessly long and complex. Suppose a student on a Pell Grant pays for rent and automobile repairs with a portion of his grant funds. Does that make "recipients" of the landlord and the repair shop -- or will the answer depend on whether the student needed an apartment or an automobile in order to attend college? If a hospital becomes a "recipient" of federal assistance by accepting fee payments from individual medicare patients, does that also create recipient status for an independent contractor which provides respiratory therapy services for the hospital? These are not far-fetched examples. The Fifth Circuit Federal Court of Appeals recently found "recipient" status in the hospital case just cited, relying heavily on the student aid analogy contained in the Supreme Court's Grove City opinion (see Frazier v. Trustees of Northwest Mississippi Regional Medical Center, July 22, 1985).

In addition, the recipient coverage issue was discussed at length in the debates over the enactment of Title VI of the Civil Rights Act in 1964. The legislative history is abundantly clear that Congress totally rejected the indirect benefit theory. As stated, for example, by Senator Humphrey, "It is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs."

It should also be noted that the blurring of direct and indirect forms of governmental aid, combined with the idea of campus-wide coverage, may force termination of student aid at some church-related colleges because the aid may be an unconstitutional establishment of religion. Governmental aid to religious schools is Constitutionally allowable so long as only secular activities are funded. But if an entire institution is now deemed a recipient when an aided student enrolls, it may be impossible to show that the student aid is used exclusively for secular purposes. Students are not required to pay tuition with their grant funds. They also co-mingle grant and personal funds in paying for all kinds of expenses incidental to their education, on and off campus. The governmental entanglement involved in trying to monitor and trace funds amid such complexities may itself violate the Establishment Clause. Such difficulties do not exist under current legal interpretation, since the "recipient" student financial aid office has an obviously secular purpose. This problem simply underscores the reality that student aid is to students, and student aid alone would not violate the Establishment Clause.

What is a private college? Is it an extension of the State, which has no lawful power to teach its own officially adopted value orientation? Or is it an extension of the parents who enroll their children as its students, and who we fully expect to adopt an explicit value orientation? The answer to these questions may well depend on our view of the spending power, or more specifically, our view of the nature of federal financial assistance to students. The precise issue is whether one student receiving a Pell Grant can, by the act of enrolling, change the essential character of an independent college from being an extension of the private parental sphere to being an extension of the State.

We may put our entire concept of the private sector at risk by accepting the notion that any "indirect benefit" constitutes the same jurisdictional basis for regulation as we have established with direct financial assistance. All private sector entities are benefitted indirectly by tax exemptions and other elements of federal tax policy. Reliance on indirect benefit as a jurisdictional theory clearly brings the nation much closer to the day when tax-exempt status may be conditioned on compliance with the federal public policies reflected in not only the civil rights laws, but in other major federal legislation. Our national commitment to civil rights is a fundamental principle in our democratic structure. But federalism and the distinction between the public and private sectors are also fundamental characteristics of our unique system. There is a crucial ecological balance among these principles. If we pay so much attention to one principle that others are jeopardized, the system itself is jeopardized.

Title IX should be amended to exclude from its definition of "recipient" those colleges receiving no direct federal assistance and whose students receive no "campus-based" benefits. This exemption could be narrowed by not applying it when the student aid involved flows directly to the college, which may have discretion in administering funds or choosing student recipients. The exemption could be further conditioned on a showing that a school has not been found in violation of other civil rights laws and that it was eligible for charitable exemption status under Section 501(c)(3) of the Internal

Revenue Code. This would assure that only those schools with exemplary civil rights records would qualify for such an exemption.

To summarize, I respectfully urge your Committees to adopt new language in any amendments to Title IX that will, first, broaden and clarify the existing religious exemption and, second, ensure that indirect student aid will not by itself trigger coverage of institutions receiving no direct federal assistance. Amendments designed to accomplish these purposes have already been introduced in the Senate by Senator Hatch. Similarly effective amendments have also been introduced in the House Committees which have heard testimony on the proposed legislation.

* * *

APPENDIX

AAPICU MEMBERSHIP & ENROLLMENTS
As of March 1985

Abilene Christian University	Texas	4,518
Academy of the New Church	Pennsylvania	159
American Baptist Theological Seminary	Tennessee	177
Anderson College	South Carolina	1,048
Andrews University	Michigan	2,851
Averett College	Virginia	916
Azusa Pacific University	California	2,467
Baker University	Kansas	839
Baptist College at Charleston	South Carolina	2,170
Baylor University	Texas	10,473
Becker Junior College	Massachusetts	1,252
Belhaven College	Mississippi	938
Benjamin Franklin University	D.C.	408
Berea College	Kentucky	1,532
Berry College	Georgia	1,499
Bethany Nazarene College	Oklahoma	1,400
Bethel College	Kansas	661
Biola University	California	3,096
Birmingham-Southern College	Alabama	1,553
Bridgewater College	Virginia	894
Brigham Young University	Utah	29,695
Brigham Young University - Hawaii Campus	Hawaii	1,607
Buena Vista College	Iowa	1,403
Calvin College	Michigan	3,807
Campbell University	North Carolina	3,052
Carroll College	Wisconsin	1,380
Catawba College	North Carolina	987
CBN University	Virginia	350
Central New England College	Massachusetts	306
Chowan College	North Carolina	1,087
Cogswell College	California	456
College of Insurance	New York	1,622
Columbia Bible College	South Carolina	877
Concordia Teachers College	Nebraska	1,062
Cumberland College	Kentucky	1,747
Dallas Baptist College	Texas	1,337
Divine Word College	Iowa	99
Dordt College	Iowa	1,077
Dr. Martin Luther College	Minnesota	725
Dropsie College	Pennsylvania	42
Eastern Nazarene College	Massachusetts	841
Eckerd College	Florida	1,051
Emory and Henry College	Virginia	769
Eureka College	Illinois	537
Flagler College	Florida	981
Furman University	South Carolina	3,105
Geneva College	Pennsylvania	1,141
Georgetown College	Kentucky	1,211
Grand Canyon College	Arizona	1,257
Greensboro College	North Carolina	585
Grove City College	Pennsylvania	2,200
Hanover College	Indiana	994

AAPICU MEMBERSHIP & ENROLLMENTS
As of March 1985

Hardin-Simmons University	Texas	1,948
Hebrew Union College	Ohio	145
Heidelberg College	Ohio	840
Hillsdale College	Michigan	1,044
Houston Baptist University	Texas	2,688
Howard Payne University	Texas	1,123
Illinois Benedictine College	Illinois	2,362
Indiana Institute of Technology	Indiana	557
International College	California	696
International Fine Arts College	Florida	267
Jamestown College	North Dakota	616
Judson College	Illinois	414
Kansas-Newman College	Kansas	759
King College	Tennessee	429
Lenoir-Rhyne College	North Carolina	1,382
Liberty Baptist College	Virginia	3,386
Limestone College	South Carolina	1,536
Loma Linda University	California	5,157
Louisburg College	North Carolina	717
Louisiana College	Louisiana	1,049
Malone College	Ohio	872
Manhattan College	New York	4,841
Maria Regina College	New York	508
McKendree College	Illinois	750
McPherson College	Kansas	496
Mercer University	Georgia	5,081
Meredith College	North Carolina	1,615
Mid-America Nazarene College	Kansas	1,218
Midway College	Kentucky	349
Milwaukee School of Engineering	Wisconsin	2,536
Mississippi College	Mississippi	2,775
Missouri Valley College	Missouri	480
Mount Saint Mary's College	Maryland	1,696
Mount Vernon Nazarene College	Ohio	1,027
National College	South Dakota	3,026
National University	California	6,824
Nichols College	Massachusetts	992
North Carolina Wesleyan College	North Carolina	932
Northrop University	California	1,445
Northwest Nazarene College	Idaho	1,221
Northwestern College	Iowa	891
Northwestern College	Wisconsin	269
Northwood Institute	Michigan	2,119
Oakland City College	Indiana	562
Oakwood College	Alabama	1,418
Ohio Northern University	Ohio	2,625
Oklahoma Baptist University	Oklahoma	1,416
Oklahoma Christian College	Oklahoma	1,614
Oklahoma City University	Oklahoma	3,158
Olivet Nazarene College	Illinois	1,907
Oral Roberts University	Oklahoma	4,024
Our Lady of the Lake University	Texas	1,577

AAPICU MEMBERSHIP & ENROLLMENTS
As of March 1985

Pacific States University	California	650
Pacific Union College	California	1,592
Palm Beach Atlantic College	Florida	656
Park College	Missouri	3,179
Parks College	Colorado	892
Parks College of St Louis University	Illinois	1,029
Patten College	California	143
Peace College	North Carolina	454
Pepperdine University	California	6,499
Point Loma Nazarene College	California	1,870
Principia College	Illinois	788
Ricks College	Idaho	6,539
Robert Morris College	Pennsylvania	5,689
Rockford College	Illinois	1,469
Roosevelt University	Illinois	6,685
Rose-Hulman Institute of Technology	Indiana	1,322
Saint Augustine's College	North Carolina	1,581
Saint Francis College	Pennsylvania	1,565
Saint Joseph's College	Indiana	963
Saint Mary's College	Minnesota	1,404
Saint Mary's College of California	California	2,956
Saint Mary's University	Texas	3,311
Salve Regina - Newport College	Rhode Island	1,961
Samford University	Alabama	4,161
School of the Ozarks	Missouri	1,293
Sierra Nevada College	Nevada	212
Simpson College	California	306
Southern College	Tennessee	1,801
Southern Methodist University	Texas	9,156
Southwestern Adventist College	Texas	712
Southwestern College	Oklahoma	51
Sterling College	Kansas	394
Taylor University	Indiana	1,460
Tiffin University	Ohio	510
Trevecca Nazarene College	Tennessee	972
Trinity Christian College	Illinois	440
Trinity College	Illinois	556
Truett McConnell College	Georgia	852
Union College	Nebraska	1,024
Union University	Tennessee	1,374
University of Dallas	Texas	2,684
University of Mary Hardin-Baylor	Texas	1,170
University of Richmond	Virginia	4,411
Valparaiso University	Indiana	4,251
Villanova University	Pennsylvania	11,716
Warren Wilson College	North Carolina	535
Wayland Baptist University	Texas	1,469
Wentworth Institute of Technology	Massachusetts	3,737
Westminster Theological Seminary	Pennsylvania	422
Wheaton College	Illinois	2,490
Whitworth College	Washington	1,802
William Jewell College	Missouri	1,569
Wingate College	North Carolina	1,481
York College of Pennsylvania	Pennsylvania	4,364
Northwestern College	Minnesota	996
Berklee College of Music	Massachusetts	2,425

The **CHAIRMAN**. Thank you, Dr. Hafen. Let's turn to you, Dr. MacKenzie. We shall take your testimony at this time.

Dr. **MACKENZIE**. Mr. Chairman, thank you for this privilege. I am president of Grove City College near Pittsburgh, PA.

Grove City is a 110-year-old college of liberal arts and sciences. Grove City abhors discrimination as immoral and un-Christian. It does not discriminate and publicly declares its commitment to nondiscriminatory policies and practices.

Like most Americans, we believe in justice and in freedom when they are bound together and support each other, but the legislation before you, in the name of justice, would diminish and eventually destroy freedom for colleges and other private institutions in the United States.

Therefore, in our opinion, this legislation is morally wrong. I am sure you are aware that this is watershed legislation, it will affect the whole nation, and will accelerate America's slide toward total Government control.

If you pass S. 272 and S. 431 as they stand, you will make it possible for every private organization and individual to be brought under Federal control. Today, concerning civil rights, and tomorrow, concerning every aspect of our lives. This legislation also significantly increases the deadly bureaucratization of the Nation as Government controllers extend the expensive web of Federal jurisdiction over all areas of American life.

This legislation would allow the state to intrude into the affairs of private institutions which take no Government funds and which have not been found to discriminate, and will further the deterioration of important social structures which stand between the public and the overwhelming power of Government.

Schools, hospitals, churches, and a host of private, voluntary associations have been identified by such scholars as Peter Berger and others, as mediating structures which have empowered individuals, fostered community, and protected people from the megastructures in American society.

If private, voluntary associations now are to be absorbed under the umbrella of Government jurisdiction, they no longer will be able to serve their vital role of mediating between Federal power and the masses of people.

Emile Durkheim once warned that modern trends threaten to sweep away the little associations which have fostered community, levaing only the state, on the one hand, and a mass of individuals on the other.

Passage of S. 272 or S. 431, as they stand, will lead to the destruction of these free mediating institutions, will vastly expand Government control of American life and greatly diminish freedom.

This, in our opinion, would substitute one terrible injustice for new, more terrible, injustices. It would drastically change the character of the Republic.

This Civil Rights Restoration Act, we believe, is destructive of free associations in general, and private higher education in specific, in the following ways.

It treats indirect Government assistance as Federal financial assistance, and says it triggers Federal jurisdiction.

Well, who in American life is not assisted in some indirect way by Government? Military protection, the National Highway Program, police and fire protection—all are federally funded programs which provide indirect assistance to everyone, and yet S. 272 and S. 431 propose that individuals or organizations which receive no direct Federal financial assistance, now should be caught in the web of Federal jurisdiction if they indirectly benefit from some federally funded program.

In effect, the legislation before you eliminates the distinction between public and private, and places everybody under Federal regulation. This certainly is contrary to the intent of the framers of the Constitution. No organization can remove itself from indirectly being assisted by some Government-funded programs. In addition this legislation also extends Federal jurisdiction to a whole State, county, city, or town, to all of education, to a whole denomination, and to other private organizations, if any part of such an entity indirectly benefits from $1 Federal.

This is not simply restoring civil rights legislation to pre-*Grove City* days. It will produce a major expansion of Government control and interference, infecting every private institution with bureaucratic waste, inefficiency, and secularism.

Grove City College has sought to distance itself from Government dollars and interference by refusing to participate in the Pell Grant Program.

It has put in place private moneys to replace Pell grants for its needy students. But even this costly and almost superhuman effort will not avail if this legislation passes.

The Government surely will trace some dollar providing indirect benefit, which will trigger jurisdiction over us. What specific effects could this legislation have upon a school like Grove City College? First, after all its efforts, Grove City will be unable to distance itself completely from some Government benefit and therefore will be subject to Government control. Its convictions about independence and freedom will be violated, and its capacity to generate a love of freedom under God, will be greatly diminished if its own freedom is violated.

Second, we probably will be unable to continue to offer quality education at remarkably low charges. Historically, Grove City has been able to offer students of modest means a splendid, private education at a very low charge. Through careful administration of its programs, presently the cost for a full year's room, board, and tuition at Grove City is $5,050, which is thousands of dollars less than at most other private colleges and universities, even though we pay faculty salaries in the 90th national percentile.

If we are infected with inefficiency and waste by Federal jurisdiction and paperwork, our charges to our students will rise dramatically.

Third, our Judeo-Christian value orientation we believe will be jeopardized. Presently, we have a required nondenominational chapel program and a required nondenominational religious course. We have no coed dorms and we have definite standards concerning alcohol, illegal drugs, and illicit sex. If a secular Government gains jurisdiction over us, its secular values cannot help but change us and other schools like us. Christian education could be emasculated. No wonder institutions, which as a matter of conscience oppose abortion, also oppose this legislation. They see clearly what the impact of Government jurisdiction will do to their values.

This legislation also could destroy the beautiful diversity of American education which is the envy of the world today, because it would reshape, homegeneously, every school according to Federal policy.

It especially would threaten those schools which, to this point, have been able to embody their values in special value-directed programs.

I ask you today, should we at Grove City College, who as a matter of conscience, have scrupulously avoided all Government funding, be regulated exactly like schools which accept directly, millions upon millions of Federal dollars?

Should we be discriminated against in such an unjust manner? I firmly believe that this Congress should pass strong civil rights legislation.

I believe that those organizations which directly accept taxpayers' money should accept Federal regulations of those programs being funded.

The most effective way, however, that the Government can fight discrimination is to aggressively regulate the host of programs and institutions which directly receive Federal funds, and to censure them if they discriminate. But I also ask that those schools, like Grove City College, which take not one penny of direct Government funding and which have not been found to discriminate, be exempted from Government jurisdiction.

If you accept the amendments Senator Hatch has proposed, you will preserve the freedom of at least some of the schools in this Nation.

I also urge you to exempt those institutions like Grove City College which have not been found to discriminate, and, which though not controlled by a religious denomination, are pervasively religious.

For example, Grove City College, which enrolls students from many denominations as well as from no denomination, is not controlled by any church, even though we are affiliated with the Presbyterian Church in the United States of America.

Since we are pervasively religious, should we not also share the exemption given those schools which are controlled by a denomination?

To do otherwise, in our opinion, would be to discriminate against us and against others like us. I close with the reminder that freedom is fragile and indivisible. If you allow freedom to be taken from one segment of society, it will not be long before other segments of society will lose their freedom.

I plead with you to let private schools remain free, as long as they take no direct Government funds and as long as they obey the laws of the land, including laws against discrimination. Please keep justice and freedom strong by keeping them both linked together.

Don't allow one to swallow up the other, for then justice will become injustice. Don't allow this watershed legislation to become the cornerstone in a new drive to shackle the American people in their private associations with Government controls.

I close with a prayer that God may free those who suffer from the pain of discrimination, and that he also will free all people from the chains of bureaucratic regulations which would alienate and divide, and which would stifle the creativity and freedom of a great people. Thank you, Mr. Chairman.

[The prepared statement of Dr. MacKenzie follows:]

TESTIMONY OF CHARLES S. MACKENZIE, PH.D.
BEFORE THE
SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION
SEPTEMBER 20, 1985

Mr. Chairman, thank you for the privilege of sharing my reaction to the proposed Civil Rights Restoration Act. I am president of Grove City College near Pittsburgh, Pennsylvania. Grove City is a 110 year old college of liberal arts and sciences. Contrary to much misrepresentation in the media, Grove City abhors discrimination as immoral and unChristian. It does not discriminate and publicly declares its commitment to nondiscriminatory policies and practices.

Like most Americans, we believe in justice and in freedom. Yet we oppose S431 because, in the name of justice, it diminishes freedom. Freedom without justice can become terribly immoral. Justice without freedom can become tyrannical immorality. For this Republic to succeed, freedom and justice must be inextricably bound together. But this legislation, in the name of justice, would diminish, and perhaps eventually even destroy the freedom of colleges and other private institutions in the United States. Therefore, this legislation is morally wrong.

It will force colleges, hospitals, and other private institutions, which have been free, to come under the jurisdiction and regulation of the state. If this body allows the state to intrude into the affairs of private institutions which take no government funds and which have not been found to discriminate, the Congress will be furthering the deterioration of important social structures which stand between the public and the overwhelming power of government. Edmund Burke once said, "To love the little platoon we belong to in society is the first principle of public affections." Schools, hospitals, churches, and a host of private, voluntary associations have been identified by Peter Berger and others as mediating structures which have empowered individuals, fostered community and protected people from the mega structures in American society. If these private, voluntary associations or "platoons" now are to come under government jurisdiction and regulation, these mediating structures no longer will serve their vital role of mediating between government power and the masses of people. Emile Durkheim once warned that modern trends threaten to sweep away the little associations which have fostered community leaving only the state on the one hand and a mass of individuals on the other. In my opinion, passage of S431, as it stands, will lead to the destruction of free, mediating institutions, vastly expand government control of American life and greatly diminish freedom. This would substitute one terrible injustice for another terrible injustice and would drastically change the character of our Republic.

The Civil Rights Restoration Act is destructive of free associations in general and private higher education in specific in the following ways:

1. It treats indirect government assistance as federal financial assistance and says it triggers federal jurisdiction. Who in American is not assisted in some indirect way by government? Military protection, police and fire protection, the national highway program--all are federally funded programs which provide indirect assistance to everyone. Those individuals or organizations which receive no direct federal financial assistance will be caught in the web of federal jurisdiction if they indirectly benefit from some federally funded program. For example, tax exemption thus can be considered as federal financial assistance to churches, private colleges, and other charitable organizations. This is not far-fetched because the Internal Revenue Service already has warned that failure of a federally-assisted college to obey federal public policy can result in the loss of tax exempt status. Will churches and other charitable organizations be next? In effect, the legislation before you, by allowing indirect assistance to become a trigger for federal jurisdiction, eliminates the distinction between public and private, and places everyone under federal regulation. This certainly is

contrary to the intent of the framers of our Constitution. No organization can remove itself from indirectly being assisted by government funded programs.

2. In addition, this destructive legislation also extends federal jurisdiction to a whole state, county, city or town, to all of education, to whole corporations, to whole denominations, and to other private organizations if such an entity indirectly benefits from one federal dollar. This is not simply restoring civil rights legislation to pre-Grove City days. It will produce a major expansion of government control and interference. Government now will be able to reach into every corner of every hitherto private organization infecting every institution with bureaucratic waste, inefficiency, and secularism.

Grove City College, ever since the Supreme Court's Grove City decision, has sought to distance itself from government dollars and interference by refusing to participate in the Pell grant program. It has put in place private monies to replace Pell grants for its needy students. Even this valiant effort will not avail if this legislation passes. The government surely will trace some dollar providing indirect benefit, which will trigger jurisdiction over us.

What effect could this legislation have upon a school like Grove City College, which for over one hundred years has sought to stand on its own feet, providing quality education at very low cost in a nondiscriminatory Christian atmosphere?

First, Grove City probably will be unable to distance itself completely from government benefit, and therefore, from government control. Its convictions about independence and freedom will be violated. Its capacity to generate a love of freedom under God will be greatly diminished if its own freedom is violated.

Secondly, we probably will be unable to continue to offer quality education at remarkably low charges. Historically Grove City has been able to offer students of modest means a splendid education at very low charge. Through very careful administration of its programs, presently the cost for a year's room, board, and tuition at Grove City is $5050, which is thousands of dollars less than at most other private colleges and universities even though we pay faculty salaries in the 90th national percentile. If we are infected with inefficiency and waste by federal jurisdiction and paperwork, our charges to our students will rise dramatically.

Thirdly, our Judeo-Christian value orientation will be jeopardized. Presently, we have a required non-denominational chapel program and a required religion course, We have no co-ed dorms and have definite standards concerning alcohol, drugs, and illicit sex. If a secular government gains jurisdiction over us, its secular values cannot help but be inflicted upon us and other schools like us. Christian education could be emasculated. No wonder institutions which as a matter of conscience oppose abortion also oppose this legislation as destructive of their values. They see clearly what the impact of government jurisdiction will do to their values.

If Grove City College, after refusing all direct funding by the government, after rejecting the Pell grant program, and after distancing itself as far as possible from federal assistance, will be deleteriously affected by this legislation, just about every other religious school in the nation would be affected similarly by the expansion of government control provided by S431. This legislation would destroy the beautiful diversity of American education which is the envy of the world because it would reshape every school according to federal policy. It especially would threaten those schools which to this point have been able to embody their values in special, value-directed programs. I find it difficult to believe that this Congress would deliberately allow such an erosion of religious and educational values to occur. Should we who, as a matter of conscience, reject government funds, be regulated just like schools which directly accept millions of federal dollars? Will we have our freedom destroyed? Will we be discriminated against simply because we want to be free under God?

I firmly believe that this Congress should pass strong Civil Rights legislation. I believe that those organizations which directly accept taxpayers' money should accept federal regulation of those programs being funded. The most effective way the government can fight discrimination is to actively regulate and to censure the programs and institutions which directly receive federal funds and which discriminate. But I also ask that those schools like Grove City College which take no direct government funding and which have not been found to discriminate be exempted from government jurisdiction. If you accept the amendments Senator Hatch has proposed, you will preserve the freedom of at least some schools in this nation.

I urge you to exempt those institutions like Grove City which have not been found to discriminate and which though not controlled by a religious denomination are pervasively religious. For example, Grove City College, which enrolls students from many denominations as well as from no denomination is affiliated with the Presbyterian Church (USA), but is not controlled by that or any other church. Since we are pervasively religious, should we not share the exemption given those schools which are controlled by a denomination?

I close with the reminder that freedom is fragile and indivisible. If you allow freedom to be taken from one segment of society, it will not be long before other segments of society will lose freedom. I plead with you to let private schools remain free as long as we take no direct government funds and as long as we obey the laws of the land including the laws against discrimination.

A while ago the prestigious Commission on Financing of Higher Education said, "We thrive on our diversities, on the competition of our American life, on our varying institutions and businesses, on our differing interests and loyalties, on the very vitality of our independence . . . Such independence will be threatened if higher education is subjected to further influence from the federal government . . . Diversity disappears as control emerges. Under control, our hundreds of universities and colleges would follow the order of one central institution. And the freedom of higher education would be lost." Please, please keep justice and freedom strong by keeping both linked together. Please don't allow either one to swallow up the other for then justice will become injustice.

Thank you.

The CHAIRMAN. Thank you, Dr. MacKenzie. We will now turn to you, Dr. Nobles. Then we will have some questions for all three of you.

Mr. NOBLES. Thank you very much, Mr. Chairman, for the opportunity of appearing. I come before you in an attempt to present the position expressed in a resolution adopted in June 1984 by the Southern Baptist Convention in meeting assembled in Kansas City, MO, as well as in a resolution adopted by the membership of the Association of Southern Baptist Schools & Colleges, June 1985, in its annual meeting. Copies of these are attached to the presentation here.

I would stress, however, from the outset, that I certainly do not represent myself, nor do I believe that anyone can represent themselves as speaking for the Southern Baptist Convention or any given State Baptist Convention.

As you may be aware, our denomination comes from a strong background of congregational government and each church is autonomous unto itself; yet "the rope of sand" that binds us as a denomination is strong enough to be expressed in a membership in excess of 14 million members with virtual total support of six theological seminaries, and a home and foreign mission board program with operational budgets in excess of $150 million annually, as well as a variety of other functions. So, in order to clarify, at this point, these are agencies supported in and through the Southern Baptist Convention. The schools, colleges, and universities are supported by the annual operational budgets of the separate State conventions within that.

Thus, the Mississippi Baptist Convention supports three colleges. The same pattern is followed in the 16 States whose conventions support a total of 52 colleges, schools, and universities.

S. 431 bears the title "Civil Rights Restoration Act of 1985." Because I believe that this title is misleading, it triggers a sense of caution as one reads any other part of the bill, lest they, too, should prove ill-founded.

S. 431 does not "restore," anyone's civil rights. The bill's title is apparently adopted in order to make the public think that prior to the *Grove City* decision of the Supreme Court, there had been a legal consensus respecting title IX, that if any part or activity of any institution, or anyone in it, could be said to be in some way the recipient of some form of Federal financial assistance, then the institution itself was the recipient and was subject to the restrictions of the statute. But the truth is, that however strenuously Federal enforcement agencies strain to impose that interpretation, the heavy weight of judicial authority rejected it, not only in the *Grove City* case but in the case of *North Haven Board of Education* v. *Bell* in 1982, when the courts clearly said:

> Title IX's legislative history corroborates its general program-specificity. Congress failed to adopt proposals that would have prohibited all discriminatory practices of an institution that received Federal funds. We conclude, then, that an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of Sections 901 and 902.

Instead of restoring anyone's civil rights, Senate bill 431, in my judgment, attempts to legitimate, and threatens to impose an unprecedented and pervasive regulatory scheme on private institutions on the grounds that they have been extended Federal financial assistance.

Here again, the bill is misleading. The public is given the impression that a proven charitable institution which totally shuns public funding is nevertheless—and I quote from one of the sponsors of the bill—"eating at the public trough," if it has some kind of connection with some program of governmental aid.

It is ironic to think of thousands of educational, charitable and religious institutions in our country, legalistically cornered into a posture of being public aid recipients when, as all the rational world is aware, that they are givers to our society, often magnanimous in the benefactions they provide through self-sacrifice, volunteered help, and contributions of time, money and dedication in order to provide services to others.

But the misleading character of this legislation does not end there. One of its most unfortunate features in the extremely loose and confused wording which is employed in key sections of the bill.

The Supreme Court has rightly warned against vague regulatory language lest "the regulatory maze created by wholly lacking in terms susceptible of objective measurements, where mean of common intelligence must necessarily guess at its meaning and differ as to its application."

I think at this point it is important to comment on, "sex discrimination," in the special context of religious institutions.

Many religious bodies are theologically bound to observe certain forms of sexual differentiation as well as certain doctrines which relate to sex, for example, respecting homosexuality, abortion, et cetera. This is not the occasion to present the committee a brief in defense of such observances. Suffice it to say that the observance of a religious tenet or conviction commanding sexual differentiation as a matter of fundamental religious liberty.

I would also pause to interject at that point, that the term "tenet" as used in the original regulation has given a great deal of trouble, because if you go to the Webster's Dictionary, you will find that the word "tenet" covers everything from an opinion, belief, to a doctrine, to a dogma, and those are all specifically allocated definitions to that particular word.

Therefore, I think that it has caused problems and misunderstanding. If the adequate religious exemption which I have above suggested were not adopted, I would then have concern with respect to the liberty of all religious educational institutions which are not controlled by some other religious organization to observe their convictions respecting homosexuality, abortion, and other matters of this nature.

In that event they would clearly need statutory protection and that should consist of an amendment limiting the term "discrimination" as found in section 901(a).

The Southern Baptist Convention resolution, as adopted in June 1984, specifically requests, "Congress to give immediate attention either to redefining the term 'recipient' in the act itself, or making quite clear that the legislative history of the act clearly exempts religious organizations, religious schools and institutions from being defined as recipients of Federal financial aid under the act, where the aid is clearly designed to aid the student, not the institution."

The resolution adopted subsequently by the Association of Southern Baptist Colleges and Schools expresses forthrightly its opposition to that portion of the proposed civil rights legislation, in 1985, that has as its purpose to impose Federal jurisdiction over Baptist colleges and universities where such jurisdiction is based solely upon the enrollment of students who are recipients of Federal funds for the purpose of securing an education.

I think that it is no secret that the framers of our Constitution sought to eradicate the danger of a central government of unlimited power by creating a Federal Government that could exercise only specifically enumerated powers.

I think you would all agree, that if the Bill of Rights had not been placed with the Constitution, it probably never would have been ratified.

I believe that any student of constitutional history would affirm this position. There are, after all, no powers enumerated in the Constitution that authorize the Federal Government to regulate a college or university as a college or university. All such laws fall flat on their face when placed against the First and 14th amendments. These provide substantial shields against Federal and State Government curbs on academic freedom, speech and activities.

Based on the limited authority of Article I, section 8, clause 1, we now have seen the expansion of the spending power of the Federal Government as a tool of coercion. Thus, the Federal Government appears to have greater power to purchase conduct than to compel it directly.

I believe any concept in which legislation is conditioned upon the receipt of Federal grants or contracts fulfilling specific conditions which intrude on the intimate relationships which define a college or university should be suspect on the face of it.

There are at least two major concerns here: The Federal spending power is far broader than any constitutional grant of direct regulatory power, and have our courts forgotten that the 10th amendment exists?

Second, our social appreciation of the dangers involved in the unchecked use of the spending power is extremely rudimentary.

Let the Government try directly to compel people to do some specific thing and they will be marching and forming barricades; but, when the Government offers to purchase compliance, the general reaction is annoyance to the increased taxes and Government waste coupled with an enormous increase in paper work.

The right of a college or university to protection under the first amendment for academic freedom is reasonably well understood.

Judge Frankfurter spelled that out in detail in *Sweezey* v. *New Hampshire,* and these were reiterated by Judge Powell in the *Baake* case.

Indecent liberties, in my judgment, have been taken with a rather terse principle summed up in Justice Holmes' famous aphorism that a man may, have a "constitutional right to talk politics, but he has no constitutional right to be a policeman."

Countless cases say the exact opposite of the position taken by some Government agencies. Government may not, in my judgment, condition the receipt of a public benefit or the holding of public office on the surrender of a constitutional right, and there are a number of cases cited here.

Thus, American colleges and universities may not have a right to receive Government-provided aid to students to subsidize their education, but once the Government decides to do that, it may not constitutionally condition the receipt of such aid upon the surrender of the schools first amendment rights without a clear nexus between the imposition of the condition and the intent of the program. Perhaps the first real step in this direction should be examined by going back to the Congressional Record, Senate page 8359-8361, April 18, 1964, in which the very concept of program specificity was so clearly indicated by the listing of the specific programs then covered by the Federal Government, and these were spelled out as specific programs.

And I would point out further, that program specificity was also clearly the order of the day in the case of the Board of Public Instruction of Taylor County, *Florida* v. *Robert H. Finch,* Secretary of HEW.

In my judgment, this is one of the most remarkable cases in U.S. history. The Fifth Circuit Court of Appeals clearly ruled against HEW, and upheld the school board position of program specificity.

What makes it more remarkable is that HEW did not choose to appeal this case to the U.S. Supreme Court, and then, in the language attendant to the original draft for title IX regulations, cited this case and drew the exact opposite conclusion from that which the Court had reached. In fact they used this decision as the basis for their, so-called, infectious theory when this particular case ruled clearly for the county school board and not for HEW.

My concerns about the theory of indirect assistance have some broader ramifications. I found it surprising, during the formal and informal discussion last year on Senate bill 2568, that so many people seemed to assume that Congress had always intended to establish regulatory jurisdiction through the spending power over all private entities that have business dealings with individuals.

The legislative history of title VI is cited partly to show that the broad interpretation some gave to Senate bill 2568 last year, and the current bills being considered, was hardly, "a return to pre-Grove City interpretaions."

There were a number of decisions prior to the Grove City College which upheld the program specificity. Moreover, this history raises a more general issue about the appropriate extent of Federal regulation based on the spending power and the Constitution.

It is fundamental in our constitutional theory that the people created the government, extending such limited grants of Governmental power as necessary to maintain a free society.

Another view of the issues is that any Government agency obviously has the responsibility and the right to verify that public funds that are spent for the purposes for which expenditures were authorized. This natural principle of accountability also assumes that funds should not be expended in ways that run counter to legitimate Government objectives, such as assuring that Government property and facilities acquired with Government financing are used without unlawful discrimination.

I think, however, we put our entire concept of the private sector at risk by accepting the notion that any indirect benefit constitutes the same jurisdictional basis for regulation as has been established by direct financial assistance.

All private sector entities are benefited indirectly by tax exemption and other elements of Federal tax policy Had S. 2568 with its heavy reliance on indirect benefit as a jurisdictional theory been enacted, we would have clearly been brought a major step closer to the day when tax-exempt statutes might be conditioned on compliance with Federal public policies reflected in not only the civil rights laws, but other major Federal legislation.

This Nation was created from the realization that governmental power is a major threat to human liberty. Our forefathers had experienced that first hand, yet that very power can be valuable medicine against other ills that threaten our freedom.

In this discussion it is fair to ask which is the greater threat, the illness or the medicine? That is especially true when the illness is institutional independence, not actual discrimination.

Title IX should be amended to exclude from its definition of recipients those colleges receiving no direct Federal assistance. This action is——

The CHAIRMAN. Dr. Nobles, I wonder if you could bring your discussion to a close.

Dr. NOBLES. Yes. I was just about to, Senator.

The CHAIRMAN. We would like to limit each of you to 10 minutes.

Dr. NOBLES. Oh, all right.

The CHAIRMAN. If we try to limit each of you to 10 minutes, we will be able to have some questions.

Dr. NOBLES. All right. I would simply, by way of summary, then, wish to express appreciation for the opportunity of appearing before this committee, and I would respectfully urge the Senate to support those amendments to title IX, clearly and unequivocally, protecting religion as a civil right, and excluding student aid from the definition of recipient. Thank you.

[The prepared statement of Dr. Nobles follows:]

STATEMENT OF
LEWIS NOBLES

BEFORE U.S. SENATE LABOR AND HUMAN RESOURCES COMMITTEE

ON

POST-GROVE CITY COLLEGE LEGISLATION AND RELIGIOUS LIBERTY

SEPTEMBER 20, 1985

I am Lewis Nobles, President of Mississippi College, a college whose Trustees are elected by the Mississippi Baptist Convention and which is supported in a significant way by the Mississippi Baptist Convention both through operational budget funds and funds earmarked for capital projects.

I come before you in an attempt to present the position expressed in a Resolution adopted in June, 1984, by the Southern Baptist Convention in meeting assembled in Kansas City, Missouri, as well as in a Resolution adopted by the membership of the Association of Southern Baptist Schools and Colleges this past June in its annual meeting in Nashville, Tennessee. Copies of these documents as well as a copy of a document, "Baptist Faith and Message Statement," are appended to this statement as attachments.

I would stress, from the outset, that I do not represent myself nor can anyone represent themselves as speaking for the Southern Baptist Convention or any given state Baptist Convention. As you may be aware, our denomination comes from a strong background of congregational government and each church is autonomous unto itself; yet "the rope of sand" that binds us as a denomination is strong enough to be expressed in a membership in excess of 14 million members with virtual total support of six seminaries and a Home and Foreign Mission Board with total operational budgets of in excess of $150 million annually, as well as a variety of other functions. In order to attempt to clarify at this point, these are agencies supported in and through the Southern Baptist Convention; the schools, colleges and universities are supported by the annual operational budgets of the separate state conventions. Thus, the Mississippi Baptist Convention supports three colleges: Blue Mountain College, William Carey College and Mississippi College. The same pattern is followed in the 16 states whose conventions support a total of 52 schools, colleges and universities.

I come before you today to plead the cause of religious liberty as the greatest freedom of all. From the beginning of our nation, it has always been recognized that religious liberty, while a prime civil right, is, more importantly, the first listed of those cognate rights--religion, speech, press, assembly and petition--united under the protection of the First Amendment. These rights may be overridden only when their exercise poses a specific and immediate threat, not avoidable by any other means, to some supreme public interest. Thomas v. Collins, 323 U.S. 516, 530-531(1945); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

TITLE IX RELIGIOUS EXEMPTIONS

As an indication of the types of difficulties that have been encountered in claiming the religious exemption under Section 86.12 of the final Title IX regulations as promulgated with an effective date of July 21, 1975, I should like to offer the following as a prime example of how any hint of ambiguity can lead to a long stalemate in matters of this nature. In the preliminary draft of regulations released for Title IX under date of June 20, 1974, Section 86.12 indicates:

> (a) Application. This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.
>
> (b) Exemption. An education institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so in writing to the Director when filing the assurance required by Section 86.4, setting forth the extent of the requested exemption and enclosing a statement of the religious tenets under which the exemption is claimed and any other information which might aid the Director in determining whether the institution qualifies for such exemption.

On page 24130 of the Rules and Regulations finally adopted, under "Analysis," Section 28, reads as follows:

> Three changes were made in Subpart B of which two might be considered substantive: The procedure for obtaining an exemption from the coverage of Title IX because of conflict between the statutory requirements and the religious tenets of a recipient or its controlling organization have been modified and simplified. An educational institution now need only submit a statement by its highest ranking official identifying the provisions of the regulation which conflict with the tenets of the religious organization involved.

Thus, the final regulations in Section 86.12 read:

> (a) Application. This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

Please note that in the preliminary draft, the institution was to submit the request and such information as necessary to aid the Director in determining whether the institution qualifies for such exemption. But, in the final regulations,

> (b) Exemption. An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

Senate Bill 431

Senate Bill 431 bears the title "Civil Rights Restoration Act of 1985." Because this title is misleading, it triggers a sense of caution as one reads other parts of the bill, lest they, too, should prove ill-founded. Senate Bill 431 does not "restore" anyone's civil rights. The bill's title is apparently adopted in order to make the public think that, prior to the Grove City decision of the Supreme Court, there had been a legal consensus respecting Title IX, that if any part or activity of any institution, or anyone in it, could be said to be in some way the recipient of some form of federal financial assistance, then the institution itself was the recipient and was subject to the restrictions of the statute. But the truth is that, however strenuously federal enforcement agencies strained to impose that interpretation, the heavy weight of judicial authority rejected it. As the Supreme Court, in 1982 (prior to Grove City) stated:

> "Title IX's legislative history corroborates its general program-specificity. Congress failed to adopt proposals that would have prohibited all discriminatory practices of an institution that received federal funds . . . .We conclude, then, that an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of Sections 901 and 902."

North Haven Board of Education v. Bell, 456 U.S. 512, 537-538 (1982).

Instead of "restoring" anyone's civil rights, Senate Bill 431 invents, attempts to legitimate, and threatens to impose, an unprecedented and pervasive regulatory scheme upon private institutions on grounds (most dubious) that they have been extended "federal financial assistance." Here again the bill is misleading. The public is given the impression that a proven charitable institution which totally shuns public funding is nevertheless "eating at the public trough" (to borrow the phrase of one of the bill's supporters) if it has some gossamer connection with some program of Governmental aid. It is ironic to think of thousands of educational, charitable and religious institutions in our country legalistically cornered into a posture of being public aid recipients when, as all the rational world is aware, they are givers to our society, often magnanimous in the benefactions they provide through self-sacrifice, volunteered help, and contributions of time, money and dedication in order to provide services to others.

But the misleading character of this legislation does not end there. One of its most unfortunate features is the extremely loose and confused wording which is employed in key sections of the bill. The Supreme Court has rightly warned against vague regulatory language lest "(t)he regulatory maze created . . .[be] wholly lacking in 'terms susceptible of objective measurements'. . . [where] men of common intelligence must necessarily guess at its meaning and differ as to its application. . ." Keyishian v. Board of Regents, 384 U.S. 589, 604 (1967). The Court, in words which come strongly to mind as one reads Senate Bill 431, warned:

> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area (of those freedoms) only with narrow specificity."

Ibid.

Senate Bill 272

I turn now to Senate Bill 272. In view of the fact that the crucially important salient on the religious liberty front is religious education, this bill is certainly superior to Senate 431. I read Senate 272 as providing that if a religious college, for example, were to accept federal funding for an agricultural education program, the institution itself would come under coverage of Title IX. While I would regard this overriding of the *Grove City* decision as needless from the point of view of protecting civil rights pertaining to sex, it would not appear threatening to these religious schools which reject governmental funding - *provided that* the phrases in Title IX, "program or activity" and "federal financial assistance," are very narrowly and very rationally construed. Since it would be improvident to presume such construction, and since religious liberty is so precious a liberty, it would appear that Senate Bill 272 should be amended.

A Broadened Religious Exemption is Needed

Section 901(c)(3) of Title IX (20 U.S.C. Section 1681(a)(3)) provides:

> "(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;"

It is not at all certain that this language is capable of construction sufficiently protective of religious organizations. First it contains a concept which has bred disputes in the past. The phrase, "institution which is controlled by a religious organization," can be read to exclude the institution which is itself a religious organization. Many religious schools and colleges today are not operated by a church or controlled by any other outside religious organization. Yet they are religious ministries, and they are entitled to the same protection which is accorded the educational institution which is controlled by a separate religious body.

Second, the word "tenet" is inadequate to protect religious liberty. In several major religious liberty cases an established religious polity or practice was not found in the formal language of one or another "tenet." In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a landmark religious liberty case decided by the Supreme Court in 1972, no "tenet" whatever was involved. Instead, at stake was the immemorial practice of a faith community respecting the lives of its young people. When NLRB attempted to impose its jurisdiction upon Catholic schools, no Catholic "tenet" was violated. Yet the religious liberties of Catholic schools were threatened with outrageous violation by the federal government (*McCormick v. Hirsch*, 460 F.Supp. 1337 (M.D.Pa. 1978)). The confining term, "tenet," leaves broad areas of religious life unprotected, one of the most significant of these being *the religious ministry* or organism - the faith community. The Supreme Court has long recognized that freedom of *the religious organism* itself is constitutionally protected, quite apart from any freedom to observe a particular "tenet." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Presbyterian Church*, 393 U.S. 440, 448 (1969).*

* I cannot but point to an extremely disturbing matter related to what appears to be a compulsive proclivity of administrative agencies to deal with religion in the manner suggested by Maupassant's phrase, "an orang-utan playing a violin." The NLRB in the parochial school cases (see NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)), the Secretary of Labor in the unemployment compensation cases (see St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981)), and a number of other federal agencies have demonstrated this. One of the great reasons for strong protective language in statutes potentially affecting religion is the intolerable burden which may be visited upon a religious body of limited resources while in the toils of an agency blind to all but its own narrow area of "expertise" and before the First Amendment claim can be aired in court.

It is to be hoped that amendatory language such as the following might be adopted:

> "(3) this section shall not apply to an educational institution which is an integral part of the religious mission of a church, or which, although not part of such mission is religious in purpose and character, and for whom application of this subsection would not be consistent with religious tenets, convictions, practices or ministry of such institution."

I have no doubt that the Congress in enacting Title IX did indeed desire to protect religious liberty and that it conceived that the exemption in Section 901(c) did exactly that. Nothing that I have found in the legislative history of Title IX indicates that there had been any information presented, or any real focus upon, the more meaningful conception of religious liberty signified by the terms, "ministry," "conviction" and "practice."

"Sex Discrimination"

At this point, it is important to comment on "sex discrimination" in the special context of religious institutions. Many religious bodies - Catholic, Protestant, Jewish - are theologically bound to observe certain forms of sexual differentiation as well as certain doctrines which relate to sex (*e.g.*, respecting homosexuality, or abortion). This is not the occasion to present the Committee a brief in defense of such observances. Suffice it to say that the observance of a religious tenet or conviction commanding sexual differentiation is a matter of fundamental religious liberty.

If the adequate religious exemption which I have above suggested were not adopted, I would then have concern with respect to the liberty of all religious educational institutions which are not controlled by some other religious organization to observe their convictions respecting homosexuality and abortion. In that event they would clearly need statutory protection, and that would consist of an amendment limiting the term "discrimination" as found in Section 901(a). A suggested text would be as follows:

> "Nothing in this title shall be construed to mean that discrimination by a religious educational institution on account of the homosexuality of any person is discrimination on account of sex within the meaning of this title where such discrimination is commanded by a religious tenet, practice or conviction; nor shall any form of sexual differentiation observed by a religious educational

> institution be deemed violative of this title where such sexual differentiation is commanded by a religious tenet, practice or conviction.
>
> "Nothing in this title shall be construed to authorize or require any religious educational institution to provide, assist in providing, or make any referral for any benefit or service relating to abortion."

I conclude this testimony as I began it, as a pleader for religious liberty. I have no hesitancy in stating that Senate Bill 431 should be rejected by the Congress on constitutional grounds. Senate Bill 272, while superior to Senate Bill 431, needs amending. The opportunity now presents itself to this Committee to advance the cause of civil rights and civil liberties by moving for full protection of what has rightly been called "the First Freedom" - religious freedom.

The Southern Baptist Convention Resolution as adopted in June, 1984, specifically requests "Congress to give immediate attention either to redefining the term 'recipient' in the Act itself or making quite clear that the legislative history of the Act clearly exempts religious organizations, religious schools and institutions from being defined as recipients of federal financial aid under the Act where the aid is clearly designed to aid the student--not the institution.

The Resolution adopted by the Association of Southern Baptist Colleges and Schools expresses forthrightly its opposition to that portion of the proposed "Civil Rights" Legislation in 1985 that has as its purpose to impose federal jurisdiction over Baptist colleges and universities where such jurisdiction is based solely upon the enrollment of students who are recipients of federal funds for the purpose of securing an education.

I think that it is no secret that the framers of the U.S. Constitution sought to eradicate the danger of a central government of unlimited power by creating a federal government that could exercise only specifically enumerated powers. If the Bill of Rights had not been placed with the Constitution, it would never have been ratified. I believe any student of Constitutional history would readily affirm this position. There are, after all, no powers enumerated in the Constitution that authorize the federal government to regulate a college or university as a college or university. All such laws--relating basically to interstate commerce authority--fall flat on their face when placed against the First and Fourteenth Amendments; these provide substantial shields against federal and state government curbs on academic freedom, speech and activities.

Based on the limited authority of Article I, Section 8, Clause 1, we now have seen the expansion of the spending power of the federal government as-a tool of coercion; thus, the federal government appears to have greater power to purchase conduct than to compel it directly!

I believe any concept in which legislation is conditioned on the receipt of federal grants or contracts fulfilling specific conditions which intrude on the intimate relationships which define a university should be suspect on the face of it! There are at least two major concerns here: the federal spending power is far broader than any constitutional grant of direct regulatory power--and have our courts forgotten the Tenth Amendment exists? Secondly, our social appreciation of the dangers involved in the unchecked use of the spending power is extremely rudimentary. Let the government try directly to compel people to do some specific thing and they will be marching and forming barricades; but, when the government offers to purchase compliance, the general reaction is annoyance to the increased taxes and government waste coupled with an enormous increase in paper work.

The right of a college or university to protection under the First Amendment for academic freedom is reasonable well understood. Judge Frankfurter spelled out some essentials in Sweezey v. New Hampshire 354 U.S. 234, 263(1957). These were reiterated by Judge Powell in the Baake case, I believe it was; if not, in another of fairly recent vintage. Thus, conditions attached to any government grant that infringes on these should be subject to challenge both on First Amendment and Due Process bases.

Indecent liberties have been taken with a rather terse principle summed up in Justice Holmes' famous aphorism that a man may have a "constitutional right to talk politics, but he has no constitutional right to be a policeman." Countless cases say the exact opposite of the position taken by some government agencies; government may not condition the receipt of a public benefit or the holding of public office on the surrender of a constitutional right. See Aboud v. Detroit Board of Education r31, U.S. 209(1977), Cafeteria and Restaurant Workers Union v. McElroy 367 U.S. 886, 894(1961), Sherbert v. Verner 374 U.S. 398, 404(1963), Spencer v. Randall 357 U.S. 513, 519-20(1958), Frost and Trucking Company v. Railroad Commission, 271 U.S. 583, 593-94(1928), etc., ad infinitum. Thus, American colleges and universities may not have a "right" to receive government-provided aid to subsidize education, but, once the government decides to do that, it may not condition the receipt of such aid upon the surrender of the schools' First Amendment rights without a clear nexus between the imposition of the condition and the intent of the program itself.

Perhaps the first real step in this direction should be examined by going back to the Congressional Record-Senate p. 8359-8361, April 18, 1964, in which the very concept of program specificity was so clearly indicated by the listing of specific programs (attached in Appendix). Program specificity was also clearly the order of the day in the case of Board of Public Instruction of Taylor County, Florida v. Robert H. Finch, Sec. HEW. This is a most remarkable case; the Fifth Circuit clearly ruled against HEW and upheld the school board's position of program specificity; what makes it more remarkable is that HEW did not choose to appeal this to the U.S. Supreme Court and then in language attendant to the original draft for Title IX regulations cited this case, and drew the exact opposition conclusion from that which the court had indicated. In fact, they used this decision as the basis for their "so-called" infectious theory when this particular case ruled clearly for the county school board and affirmed the program specificity. (This was No. 26841 in the U.S. Court of Appeals, Fifth Circuit, August 12, 1969.)

My concerns about the theory of "indirect assistance" have some broader ramifications. I found it very surprising during the formal and informal discussion last year on S. 2568 that so many people seemed to assume that Congress had always intended to establish regulatory jurisdiction through the spending power over all private entities that have business dealings with individuals who receive federal funds. The plain meaning of S. 2568's language seemed to apply the student assistance analogy to an endless variety of circumstances and transactions, including grocery stores that receive food stamps, apartment owners receiving rent from federally subsidized tenants, or private hospitals whose patients pay with medicare funds. These very circumstances were discussed at length in the debates over the enactment of Title VI of the Civil Rights Act in 1964. The legislative history is abundantly clear that Congress rejected the indirect benefit theory. As stated, for example, by Senator Humphrey, "It is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs."

The legislative history of Title VI is cited partly to show that the broad interpretation some gave to S. 2568 was hardly a "return to pre-Grove City interpretations." Moreover, this history raises a more general issue about the appropriate extent of federal regulation based on the spending power in the Constitution. The most ardent advocates seek to eliminate all "structural" sources of what they perceive to be discriminatory attitudes. With such a broad goal in mind, why doesn't Congress pass a law forbidding all gender-based distinctions by all parties, public or private? (Commissioner Mary Berry stated her willingness to support just such a law in her House of Representatives testimony of the 1984 Civil Rights Act.) Why encumber the quest for a distinction-free society by clinging to concepts as limited as the Commerce Clause or the spending power? It is not enough to reply in a strictly technical manner that acts of Congress must be grounded in constitutional grants of power. The more important question is why the Constitution was created with such a theory in mind.

It is fundamental in our constitutional theory that the people created the government, extending such limited grants of governmental power as were necessary to maintain a free society. This theory left to each individual the right to define the personal meaning of his or her own life. The State had no right to establish an official religion or to establish other official sources that would define or prescribe individual philosophies of life. The concept of "State action" as embodied in the Bill of Rights and the Fourteenth Amendment became our most potent limitation on the right of the government to discriminate among its citizens. At the same time, and as part of the same general theory, individual citizens were not only left free but were given constitutional protection to make choices, establish churches, seek education, and in other ways engage in their personal pursuits of both happiness and meaning. It was fully intended under this theory that parents would teach their children and churches would teach their members what they took to be the Truth. We have always expected of parents what we would never tolerate from government: the inculcation of specific value orientations.

What is a private college? Is it an extension of the State, which has no lawful power to teach its own officially adopted value orientation? Or it is an extension of the parents who enroll their children as its students, and whom we fully expect to adopt an official value orientation? The answer to these questions may well depend on our view of the spending power, or more specifically, our view of the nature of federal financial assistance to students. The precise issue is whether some students receiving Pell grants or VA benefits can, by the act of enrolling, change the essential character of a college from being an extension of the private parental sphere to being an extension of the State. One view of this issue is that every possible source of individual value orientations must be controlled if society is ever to rid itself of privately held beliefs that allow or encourage gender-based distinctions of any kind. With that view in mind, the spending power becomes an attractive vehicle to extend federal control to untested extremes, simply because of the incredible dominance of federal money in the contemporary economy. Here federal money is the means, but power is the end. (It should be noted, parenthetically, that the Equal Rights Amendment would not go as far as S. 2568 would go in establishing gender-neutral values, since the ERA would apply only to state--not private--action. The spending power is the theoretical source of this jurisdictional extension over private action.)

Another view of the issue is that any government agency obviously has the responsibility and the right to verify that public funds are spent for the purposes for which the expenditures were authorized. This natural principle of accountability also assumes that "funds should not be expended in ways that run counter to legitimate government objectives, such as assuring that government property and facilities acquired with government financing are used without unlawful discrimination." However, this second view carries with it a cautious restraint about manipulating the federal spending power until it becomes a Trojan horse in every office or conversation where the influence of federal spending is felt, because such manipulation can so easily establish a unitary sovereignty that destroys crucial long-term checks and balances in our system of limited government.

We may put our entire concept of the private sector at risk by accepting the notion that any "indirect benefit" constitutes the same jurisdictional basis for regulation as we have established with direct financial assistance. All private sector entities are benefitted indirectly by tax exemptions and other elements of federal tax policy. Had S. 2568, with its heavy reliance on indirect benefit as a jurisdictional theory, been enacted, we would have clearly been brought a major step closer to the day when tax-exempt status may be conditioned on compliance with the federal public policies reflected in not only the civil rights laws, but other major federal legislation. This nation's commitment to civil rights is a fundamental principle in our democratic structure. But federalism and the distinction between the public and private sectors are also fundamental characteristics of our unique system. There is a crucial ecological balance among these principles. If we pay so much attention to one principle that others are jeopardized, the system itself is jeopardized.

This nation was created from the realization that governmental power is a major threat to human liberty. Yet that very power can be valuable medicine against other ills that threaten our freedom. In this discussion, it is fair to ask which is the greater threat--the illness or the medicine? That is especially true when the "illness" is institutional independence, not actual discrimination. Title IX should be amended to exclude from its definition of "recipient" those colleges receiving no direct federal assistance. This action is necessary to reverse that portion of the Grove City case which held that indirect aid to students constitutes aid to an educational institution. Such an exemption is especially needed if the "program specific" portion of the Grove City ruling is overturned by new legislation, because in using student aid to create a recipient status for a school, the Supreme Court intended only to regulate its financial aids office. As discussed above, an exemption for student aid is consistent with the legislative history of Title VI of the Civil Rights Act. It is also consistent with a balanced view of the spending power that respects the right of private institutions to avoid a quasi-public status by rejecting direct federal aid.

By way of summary, I wish to express appreciation for the opportunity of appearing before this committee and I respectfully urge the Senate to support amendments to Title IX clearly and unequivocally protecting religion as a civil right and excluding student aid from the definition of recipient.

Thank you for this opportunity of appearing before you today.

ATTACHMENTS

Excerpt from Southern Baptist Convention Annual, 1984.

Resolution adopted by the Southern Baptist Convention, June, 1984.

Resolution adopted by the Association of Southern Baptist Colleges and Schools, June 27, 1984.

Copy of pages 8359, 8360, and 8361, Congressional Record--Senate, April 18, 1964.

Copy of The Baptist Faith and Message, adopted by the Southern Baptist Convention in 1963.

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Resolution No. 6 — On the Civil Rights Act of 1984

WHEREAS, The United States Congress is currently considering the Civil Rights Act of 1984; and

WHEREAS, That Act, because of bipartisan support, will likely pass this summer; and

WHEREAS, That Act seeks to clarify the application of previous existing acts which prohibit discrimination on the basis of race, religion, sex, and age; and

WHEREAS, Many religious schools and exclusively religious organizations have scrupulously avoided direct federal financial assistance so that they could maintain independence from federal regulations and interference; and

WHEREAS, That Act, in defining organizations which are to be considered "recipients" of federal financial assistance includes categories which may be misleading and which could result in undue government intrusion in the affairs of religious organizations, religious schools, and institutions.

Therefore, be it *Resolved*, That we, the messengers of the Southern Baptist Convention, meeting in Kansas City, Missouri, June 12-14, 1984 request Congress to give immediate attention either to redefining the term "recipients" in the Act itself or making certain that the legislative history of the Act clearly exempts exclusively religious organizations, religious schools, and institutions from being defined as recipients of federal financial assistance under the Act; and

Be it finally *Resolved*, That the Christian Life Commission and the Baptist Joint Committee on Public Affairs be requested to notify the Congress of this resolution as soon as possible.

RESOLUTION ON CIVIL RIGHTS

WHEREAS, Southern Baptists believe that Government regulation of higher education should be restricted to those areas in which Government has a legitimate interest; and

WHEREAS, Southern Baptists believe that the regulation of higher education should be limited to the programs directly assisted and that such regulation should be appropriate to both the level and the duration of the support provided; and

WHEREAS, Southern Baptists believe that government regulations should not be premised upon financial assistance received directly by students; and

WHEREAS, many independent, private and church-related colleges--especially Baptist colleges and universities receive no direct Federal financial aid; and

WHEREAS, such Baptist colleges and universities have made determined efforts over many years to finance their own operations by way of charitable gifts from individuals, the local churches, corporations, and foundations; and

WHEREAS, such educational institutions have been motivated to finance their own operations because of their long-held belief that the continuing freedom of the country demands that independent, private educational institutions remain free of government control; and

WHEREAS, prior to the Supreme Court decision on the Grove City Case, the general position was that Federal financial aid paid directly to the student did not make such institutions "recipients" of Federal funds within the meaning of the law; and

WHEREAS, Southern Baptists believe that the civil rights enforcement policies of the United States must make allowance for the First Amendment religious and free expression interests of independent private colleges and universities and other institutions as civil rights having extraordinary value; and

WHEREAS, new Civil Rights legislation now being proposed will result in the imposition of campus-wide regulation over schools who receive no direct Federal financial aid and destroy these time-proven concepts of independency in which Baptists believe; and

WHEREAS, the Southern Baptist Convention in its annual meeting in Kansas City in 1984 and many Baptist State Conventions of the various states have adopted resolutions opposing Federal jurisdiction over independent, private colleges when such jurisdiction is based solely on financial aid to students.

NOW, THEREFORE BE IT RESOLVED, that the Association of Southern Baptist Colleges and Schools does hereby express again its opposition to that portion of the Civil Rights Legislation of 1985 that has its purpose to impose Federal jurisdiction over Baptist colleges and universities where such jurisdiction is based solely upon the enrollment of students who are recipients of Federal funds for the purpose of education.

Report of the Resolutions Committee
Association of Southern Baptist Colleges and Schools
June 27, 1984

WHEREAS Baptist education has been an integral part of the development of the Southern Baptist Convention and the several state conventions and associations, and

WHEREAS Baptist institutions of education have been servants of the Master Teacher in promulgating the Gospel by preparing individuals to carry out the Great Commission, and

WHEREAS Baptist institutions of education are and have been a salient arm of Southern Baptist work, and

WHEREAS these institutions have an historical role of intellectual inquiry within a framework of Christian principles and Baptist doctrine, therefore:

BE IT RESOLVED that the presidents and deans of member institutions of the Association of Southern Baptist Colleges and Schools reaffirm our commitment to the unique and distinctive historical role and mission of our institutions as adopted June 12, 1976, in Williamsburg, Virginia, and again June 9, 1979, in Galveston, Texas, by the Association of Southern Baptist Colleges and Schools; and,

BE IT RESOLVED that the presidents and deans express appreciation and gratitude to the Southern Baptist Convention, the several state conventions and the churches:

(1) for past, current, and continued support of Baptist institutions at which a Biblically based intellectual inquiry is not only permitted but encouraged; and,

(2) for the multitudes of fellow Christians who have served and continue to serve God as board members, administrators, faculty, and staff in these institutions; and,

(3) for the current and continued cooperative and individual financial support to provide a Christian education for our youth and other constituents; and,

(4) for the current and continued financial and philosophical support of the Education Commission of the Southern Baptist Convention and for the provision of the staff in terms of leadership resources for Baptist institutions; and,

BE IT RESOLVED that the presidents and deans reaffirm their integral role as partners in the promulgation of the Gospel through Christian education; and

BE IT RESOLVED that the presidents and deans seek continued support for Baptist institutions of education in perspective of historical relationships; and

BE IT FURTHER RESOLVED that the president of the Association of Southern Baptist Colleges and Schools transmit this resolution to the Executive Committee of the Southern Baptist Convention and the several state conventions with a copy of the reaffirmations adopted by the Association, June 12, 1976, in Williamsburg, Virginia, and the recommitments adopted by the Association, June 9, 1979, in Galveston, Texas.

RESOLUTION

WHEREAS, member institutions of the Association of Southern Baptist Colleges and Schools have policies and practices in opposition to discrimination, and

WHEREAS, the United States Supreme Court in the recent Grove City College case did find that programs of colleges and universities are not subject to Title IX unless those programs are specifically funded by federal funds; and

WHEREAS, in the aftermath of the above cited case, legislation has been introduced in the Congress (House, H.R. 5011 and in the Senate, S.2568 and similar bills) which, if adopted, would destroy the "program specific" nature of the decision as well as that spelled out in the original Civil Rights Act of 1964, and

WHEREAS, the adoption of such legislation would be highly expensive both to the Federal government and all institutions and agencies (special note should be taken of the definition of "recipient" in the proposed legislation) that would come under the governmental regulation; and

WHEREAS, the proposed legislation, if adopted, would eradicate the protection that independent institutions have enjoyed since the founding of this Republic (the famous Dartmouth College case having set this precedent),

BE IT RESOLVED, that the members of the Association of Southern Baptist Colleges and Schools hereby call on the Congressional delegation of each state represented thereby to take whatever action is necessary to prevent these unfortunate proposals from becoming the law of the land; and

BE IT FURTHER RESOLVED, that Dr. Walker be directed to forward copies of this Resolution to each of the State Baptist papers and to the Baptist Press requesting that they exert every effort to inform their leaders about this legislation and request that they elicit support against the enactment of this proposed legislation; and

BE IT FURTHER RESOLVED, that the individual presidents of member institutions be urged to express their opposition to the effects that such legislation could have on their individual institution and that each president be requested to ask his Trustees, individually and/or collectively to express similar opposition to their Representatives and Senators.

its recommendations, regardless of how fantastic and unconstitutional they may be. In fact, the Commission has become the agent and tool of one single minority pressure group composing roughly less than 10 percent of the population, and in order to further what it considers the "rights" of this pressure group, it will destroy and emasculate the rights of all other citizens and create a situation where, under Federal law, the minority will be the privileged class and the majority will be the underprivileged class, without retaining any constitutional rights, privileges, or immunities. To express this in another way, the Commission is apparently dedicated to destroying the civil liberties of individual citizens upon the excuse that civil regimentation by Federal personnel is a protection of civil rights against State interference.

Then we also have the situation, Mr. President, of a proliferation of Federal agencies. We start with the Civil Rights Commission; then you add the special powers and duties that are given to the Commissioner of Education in the Department of Health, Education, and Welfare. Then you consider that there is a division known as the Civil Rights Division of the Department of Justice, with a special Assistant Attorney General heading it up, that performs a factfinding function similar in many respects to that performed by the Civil Rights Commission. Then, as an afterthought, after first taking it out, the House of Representatives restored the community relations service, which will be discussed at a later point in this dissertation. Once you start rolling the snowball, Mr. President, it grows and grows and grows before it finally reaches the bottom of the hill. The Civil Rights Commission should be immediately abolished.

Title VI is styled, "Nondiscrimination in Federally Assisted Programs." Mr. President, I say without fear of contradiction that this is the most dangerous grant of power from the legislative to the executive branch of government that was ever proposed in the long history of this Government. This character of grant would have been dangerous even when we did not have the multitude of Federal programs and grants and aid to States and communities. Now, with a budget of almost $100 billion a year, there is no end to the reach of the Federal Government into the intimate life of every citizen of the United States. No title of this proposed act should receive any more careful scrutiny.

Section 601 provides:

> Notwithstanding any inconsistent provision of any other law, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

This section cuts across every statute and legislative act that has been placed in the Statutes at Large since volume I. Neither here nor subsequently is there any attempt to define what is meant by the term "discrimination" or to set up any guidelines as to when and how a person is denied the benefit of a program or activity on the grounds of race, color, or national origin.

Section 602 compounds the confusion by giving to every Federal department or agency which is empowered to extend Federal financial assistance to any program or activity the power to effectuate the provisions of section 601 with respect to such program or activity. This means that countless bureaucrats throughout every agency and department of Government would be drawing their own peculiar rules, regulations, and orders to conform with what they conceive to be the objectives of the statute. The Attorney General, at the request of the House Judiciary Committee, had prepared a list of programs which may involve Federal financial assistance, which appears in part IV of the hearings. It is hard even to conceive that the Federal Government could be engaged in so many different and manifold kinds of activities involving grants, aid, loans, and financial assistance of every kind as is revealed by this list. Let me present a few of them at random.

I ask unanimous consent, Mr. President, that the complete tabulation be printed in the RECORD at this point in my remarks.

There being no objection, the tabulation was ordered to be printed in the RECORD, as follows:

Programs which may involve Federal financial assistance

	1963 expenditures
Executive Office of the President:	
Office of Emergency Planning: State and local preparedness (p. 52)	0
Funds appropriated to the President:	
Disaster relief: disaster relief (p. 59)	$30,802,990
Expansion of defense production: Revolving fund, Defense Production Act (p. 60)	—56,513,374
Public works acceleration: Public works acceleration (p. 86)	61,843,808
Transitional grants to Alaska: Transitional grants to Alaska (p. 87)	3,110,283
Department of Agriculture:	
Cooperative State Experiment Station Service: Payments and expenses (p. 95)	37,092,460
Extension Service: Cooperative extension work, payments and expenses (p. 96)	74,887,584
Soil Conservation Service:	
Watershed protection (p. 100)	53,092,516
Flood prevention (p. 103)	26,488,410
Great Plains conservation program (p. 104)	9,747,075
Resource conservation and development (p. 105)	0
Agricultural Marketing Service:	
Payments to States and possessions (p. 113)	1,432,763
Special milk program (p. 113)	95,360,634
Programs which may involve Federal financial assistance—Continued	
Department of Agriculture—Continued	
Agricultural Marketing Service—Continued	
School lunch program (p. 114)	$169,597,18
Removal of surplus agricultural commodities (p. 116)	131,805,11
Agricultural Stabilization and Conservation Service:	
Expenses, Agricultural Stabilization and Conservation Service (p. 122)	87,415,517
Sugar Act program (p. 125)	76,929,884
Agricultural conservation program (p. 125)	221,194,21
Land-use adjustment program (p. 127)	2,000,000
Emergency conservation measures (p. 127)	2,701,427
Conservation reserve program (p. 127)	304,342,306
Commodity Credit Corporation:	
Price support and related programs and special milk (p. 132)	3,486,356,042
National Wool Act (p. 137)	69,164,361
Rural Electrification Administration: Loan authorizations (p. 148)	331,556,082
Farmers Home Administration:	
Rural housing grants and loans (p. 151)	194,203,324
Rural renewal (p. 152)	0
Direct loan account (p. 153)	58,948,965
Emergency credit revolving fund (p. 156)	7,888,613
Rural housing for the elderly revolving fund (p. 158)	0
Forest Service:	
Forest protection and utilization (p. 170)	197,342,562
Assistance to States for tree planting (p. 176)	1,203,697
Payments to Minnesota (Cook, Lake, and St. Louis Counties) from the national forests fund (p. 177)	125,[illegible]
Payments to counties (national grasslands) (p. 177)	393,674
Payments to school funds, Arizona and New Mexico, act of June 10, 1910 (p. 177)	80,463
Payments to States, national forests fund (p. 177)	27,235,146
Department of Commerce:	
Area Redevelopment Administration:	
Grants for public facilities (p. 188)	475,846
Area redevelopment fund (p. 189)	—499,832
Office of Trade Adjustment: Trade adjustment assistance (p. 202)	2,820
Maritime Administration:	
Ship construction (p. 233)	107,483,183
Operating-differential subsidies (p. 234)	229,676,686
Maritime training (p. 227)	2,297,777
State marine schools (p. 227)	1,420,724

Programs which may involve Federal financial assistance—Continued

Department of Commerce—Continued	*1963 expenditures*
Bureau of Public Roads:	
Forest highways (p. 237)	$30,625,999
Public lands highways (p. 239)	2,128,990
Control of outdoor advertising (p. 239)	0
Highway trust fund (p. 241)	[1] 3,017,268,879
Department of Defense:	
Military personnel:	
National Guard personnel, Army (p. 253)	212,109,751
National Guard personnel, Air Force (p. 254)	45,366,036
Operation and maintenance:	
Operation and maintenance, Army National Guard (p. 267)	174,050,283
Operation and maintenance, Air National Guard (p. 269)	193,258,395
National Board for Promotion of Rifle Practice, Army (p. 269)	650,368
Military construction:	
Military construction, Army National Guard (p. 306)	18,383,216
Military construction, Air National Guard (p. 306)	21,912,946
Civil defense:	
Operation and maintenance, civil defense (p. 313)	34,457,221
Research and development, shelter, and construction, civil defense (p. 314)	11,810,129
Civil functions: Payments to States, Flood Control Act of 1954 (p. 378)	1,613,757
Department of Health, Education, and Welfare:	
Office of Education:	
Promotion and further development of vocational education (p. 402)	34,330,192
Further endowment of colleges of agriculture and mechanic arts (p. 402)	11,950,000
Grants for library services (p. 402)	7,258,880
Payments to school districts (p. 402)	276,910,035
Assistance for school construction (p. 403)	66,241,942
Defense educational activities (p. 404)	198,335,518
Expansion of teaching in education of the mentally retarded (p. 406)	950,631
Expansion of teaching in the education of the deaf (p. 406)	1,382,635
Cooperative research (p. 406)	5,015,385
Foreign language train- and area studies (p. 407)	----------------
Colleges of agriculture and mechanic arts (p. 408)	2,550,000
Promotion of vocational education, act of Feb. 23, 1917 (p. 409)	7,144,113
Department of Health, Education, and Welfare—Continued	*1963 expenditures*
Office of Vocational Rehabilitation:	
Grants to States (p. 409)	$70,651,560
Research and training (p. 410)	24,145,307
Public Health Service:	
Accident prevention (p. 415)	3,679,047
Chronic diseases and health of the aged (p. 416)	16,303,114
Communicable disease activities (p. 417)	10,749,235
Community health practice and research (p. 419)	23,946,767
Control of tuberculosis (p. 420)	6,813,635
Control of venereal diseases (p. 420)	7,843,535
Dental services and resources (p. 421)	3,803,482
Nursing services and resources (p. 422)	8,373,620
Hospital construction activities (p. 423)	187,432,190
George Washington University Hospital construction (p. 424)	0
Aid to medical education (p. 424)	0
Environment health sciences (p. 425)	0
Air pollution (p. 425)	10,100,876
Milk, food, interstate and community sanitation (p. 426)	8,723,615
Occupational health (p. 427)	4,059,384
Radiological health (p. 428)	13,466,288
Water supply and water pollution control (p. 429)	22,554,121
Grants for waste treatment works construction (p. 430)	81,736,090
National Institutes of Health (pp. 535–444)	733,507,236
Social Security Administration:	
Grants to States for public assistance (p. 460)	2,723,677,540
Training of public welfare personnel (p. 463)	0
Assistance for repatriated U.S. nationals (p. 464)	412,044
Grants for maternal and child welfare (p. 465)	76,087,682
Cooperative research demonstration projects in social security (p. 468)	952,654
Assistance to refugees in the United States (p. 469)	53,902,237
American Printing House for the Blind: Education of the blind (p. 472)	718,707
Gallaudet College: Salaries and expenses (p. 474)	1,458,618
Howard University:	
Salaries and expenses (p. 475)	5,342,281
Construction (p. 476)	2,687,024
Office of the Secretary:	
Juvenile delinquency and youth offenses (p. 480)	4,473,623
Educational television facilities	1,816
Department of the Interior:	*1963 expenditures*
Bureau of Land Management:	
Payments to Oklahoma (royalties) (p. 491)	$6,214
Payments to Coos and Douglas Counties, Oreg., from receipts, Coos Bay Wagon Road grant lands (p. 491)	697,440
Payments to counties, Oregon and California grant lands (p. 491)	15,400,136
Payments to States (grazing fees) (p. 492)	817
Payments to States (proceeds to sales) (p. 492)	243,323
Payments to States from grazing receipts, etc., public lands outside grazing districts (p. 492)	183,632
Payments to States from grazing receipts, etc., public lands within grazing districts (p. 492)	200,449
Payments to States from grazing receipts, etc., public lands within grazing districts, miscellaneous (p. 492)	7,921
Payments to States from receipts under Mineral Leasing Act (p. 492)	47,147,883
Payments to counties, national grasslands (p. 492)	92,253
Bureau of Indian Affairs:	
Education and welfare services (p. 493)	77,723,737
Menominee educational grants (p. 499)	896,000
National Park Service:	
Payment for tax losses on land acquired for Grand Teton National Park (p. 511)	27,287
Bureau of Mines: Drainage of anthracite mines (p. 524)	30,801
Office of Minerals Exploration:	
Salaries and expenses (p. 528)	530,203
Lead and zinc stabilization programs (p. 528)	1,467,052
Bureau of Commercial Fisheries:	
Construction of fishing vessels (p. 533)	845,450
Payment to Alaska from Pribilof Islands fund (p. 536)	702,000
Fisheries loan fund (p. 536)	−1,287,010
Bureau of Sport Fisheries and Wildlife:	
Federal aid in fish restoration and management (p. 542)	5,768,726
Federal aid in wildlife restoration (p. 542)	15,830,063
Payments to counties, national grasslands (p. 543)	−1,070
Payments to counties from receipts under Migratory Bird Conservation Act (p. 543)	882,407
Bureau of Reclamation:	
Construction and rehabilitation (p. 548)	188,183,848
Loan program (p. 551)	14,420,977

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[1] This amount is on a checks-issued (gross) basis. Receipts (collections deposited) totaled $3,292,965,963 in fiscal year 1963.

Programs which may involve Federal financial assistance—Continued

	1963 expenditures
Department of the Interior—Continued	
Bureau of Reclamation—Continued	
Payments to States of Arizona and Nevada (p. 556)	$600,000
Upper Colorado River storage project (p. 557)	108,396,150
Department of Labor:	
Office of Manpower, Automation, and Training:	
Manpower development and training activities (p. 600)	51,783,663
Area redevelopment activities: Salaries and expenses (p. 601)	6,676,623
Bureau of Employment Security:	
Unemployment compensation for Federal employees and ex-servicemen (p. 606)	153,654,503
Salaries and expenses, Mexican farm labor program (p. 607)	1,814,958
Farm labor supply revolving fund (p. 608)	1,179,030
Unemployment trust fund (p. 946)	[1] 3,815,620,490
Office of the Secretary:	
Trade adjustment activities (p. 619)	810
Department of State:	
Educational exchange:	
Mutual educational and cultural exchange activities (p. 649)	26,307,202
Center for Cultural and Technical Interchange Between East and West (p. 651)	7,344,731
Federal Aviation Agency:	
Grants-in-aid for airports (p. 700)	51,493,441
General Services Administration:	
Real property activities:	
Hospital facilities in the District of Columbia (p. 714)	74,677
Housing and Home Finance Agency:	
Office of the Administrator:	
Urban planning grants (p. 742)	13,366,697
Open-space land grants (p. 743)	265,014
Low-income housing demonstration programs (p. 744)	148,976
College housing loans (p. 745)	283,573,516
Public facility loans (p. 747)	30,047,779
Public works planning (p. 749)	5,664,028
Urban renewal fund (p. 753)	173,208,174
Housing for the elderly funds (p. 757)	18,656,257
Federal National Mortgage Association:	
Special assistance functions fund (p. 761)	−262,295,979
Federal National Mortgage Association secondary market operations (p. 956)	−720,621,211
Housing and Home Finance Agency—Continued	
Public Housing Administration: Low-rent public housing program fund (p. 773)	$178,897,425
Veterans' Administration:	
Direct loans to veterans and reserves (p. 803)	−66,178,201
Civil Aeronautics Board:	
Payments to air carriers (p. 818)	81,656,763
Farm Credit Administration:	
Short-term credit investment fund (p. 835)	13,310,000
Banks for cooperatives investment fund (p. 836)	−11,079,600
Federal Home Loan Bank Board: Federal Home Loan Bank Board revolving fund (p. 840)	−110,418
Federal Power Commission:	
Payments to States under Federal Power Act (p. 850)	56,463
National Capital Housing Authority: National Capital Housing Authority trust fund (p. 968)	−2,354,674
National Capital Planning Commission: Land acquisition, National Capital park, parkway, and playground system (p. 860)	1,395,568
National Science Foundation: Salaries and expenses (p. 864)	206,860,160
Small Business Administration:	
Trade adjustment loan assistance (p. 875)	0
Revolving fund (p. 876)	134,320,156
District of Columbia:	
Federal payment to District of Columbia (p. 913)	32,009,000
Loans to District of Columbia for capital outlay, general fund (p. 913)	0
Loans to District of Columbia for capital outlay, highway fund (p. 914)	7,600,000
Loans to District of Columbia for capital outlay, water fund (p. 914)	660,000
Loans to District of Columbia for capital outlay, sanitary sewage works fund (p. 914)	3,400,000
Federal contributions and loans to the metropolitan area sanitary sewage works fund (p. 915)	14,200,000
Repayable advances to District of Columbia general fund (p. 915)	7,000,000
Advances to stadium sinking fund, Armory Board (p. 915)	416,800

Mr. EASTLAND. Mr. President, the genesis of this title arose in a recommendation of the Civil Rights Commission. The Commission made what it termed an "interim report" to the President, which contained the most monstrous libels that have even been uttered against a sovereign State of this Union. One sentence in this report charged:

> Even children, at the brink of starvation, have been deprived of assistance by the callous and discriminatory acts of Mississippi officials administering Federal funds.

The report pointed out that in the fiscal year 1962 payments from the Federal Government to State, counties, municipalities, and individuals in Mississippi exceeded $650 million. One of the three so-called recommendations to the President was that—

> The Congress and the President consider seriously whether legislation is appropriate and desirable to assure that Federal funds contributed by citizens of all States not be made available to any State which continues to refuse to abide by the Constitution and laws of the United States, and, further, that the President explore the legal authority he possesses as Chief Executive to withhold Federal funds from the State of Mississippi.

This monstrous proposal drew from the President the following reply:

> I don't have the power to cut off the aid in a general way as proposed by the Civil Rights Commission, and I would think it would probably be unwise to give the President of the United States that kind of power, because it could start in one State and for one reason or another it might be moved to another State which was not measuring up as the President would like to see it measure up in one way or another.

This was a very sound and an appropriate reply from the late President Kennedy to the proposal advanced by the Civil Rights Commission. But the pressure by the minority groups became so great that, strange as it may seem, less than 2 months after the President uttered these words he sent a special message to Congress outlining a new civil rights program, and title VI of his proposed package contained the very provision that he had repudiated in regard to withholding financial assistance. The recommendation originally contained in title VI has been changed in the House and, if anything, the changes make the provision more obnoxious than the original recommendation. At least, the original recommendation provided that the President should provide the conditions regarding withholding of funds, and the changes delegate the function to the countless bureaus, agencies, and programs that administer the grants, loans, and programs that I have previously set forth in my remarks. If any one title of the bill can be said to be more obnoxious than any other, this unconstitutional delegation of nebulous authority to the President and executive branch of the Government to penalize citizens of the United States at his whim and caprice is far and wide the worst feature of the bill.

Title VII—"Equal Employment Opportunity"—is a provision that was not recommended by the President. This is purely and simply the old FEPC that was originally recommended by the Truman Commission and repudiated out of hand by Congress time and time again. The President recommended that his Commission on Equal Employment Opportunity which was established by an Executive order, and which is without constitutional sanction, be given statutory recognition. This Commission operates only in the area of Government

[1] This amount is on a check-issued (gross) basis. Receipts (collections deposited) totaled $4,256,052,867 in fiscal year 1963.

The **Chairman**. Thank you, sir. We will enforce a 10-minute rule more strictly from now on so that we can have enough time for questions.

Let me first ask all of you several questions about the issue of the religious liberty exemption in title IX, I will start with you, Dr. Hafen, and we will go next in the order of your testimony to Dr. MacKenzie, and then to Dr. Nobles.

Gentlemen, if a college receives Federal assistance, why should it not conform to the public policies which are attached to such assistance? What is the rationale, if any, for allowing a college to subordinate such public policies to its own religious practices?

Dr. **Hafen**. I think that question was answered, Senator Hatch, when title IX was first enacted. It was understood by the Congress then, and has been I think for many years, that religious liberty is a constitutional right. It is itself a civil right.

It is difficult to enforce some civil rights at the expense of others, but there was a recognition of religious liberty in the Congress at the time the religious exemption in title IX, narrow as it is, was adopted.

Private institutions having church affiliations, or religious missions, may have a different view about the best kind of education, from the view that might be imposed by a Federal agency interested in education. Diversity in the whole system of higher education depends on allowing individual institutions the right to define their own missions.

Whether a college should be coed, single sex, a military academy, religiously oriented: secular in its orientation, vocational, liberal arts—all of those questions have been left within the province of institutions to determine. That is part of the whole spirit of the first amendment.

And we put at risk that kind of diversity and the liberty embodied in the first amendment, if in our efforts to preserve, obviously, an important interest, that of eradicating discrimination, we destroy all the other interests we have, then we have gone too far, even in the interest of something worthwhile.

The **Chairman**. Dr. MacKenzie, would you please answer the same question.

Dr. **MacKenzie**. I would agree with Dr. Hafen, although I would qualify it, Senator. I personally believe very strongly, that any educational institution, be it religious or not, which accepts direct Government funding, should accept Government regulation over those programs which are funded.

The **Chairman**. Dr. Nobles?

Dr. **Nobles**. I would add that same qualification, certainly agreeing that if direct Federal aid is given to an institution, I think obviously it should be under Government regulation in that given area. But I do think that, really, the germ of this entire concept is that those institutions, which because of their religious nature, program, heritage, desire, position themself in an attempt to avoid any direct financial aid, ought not to be brought under that same umbrella of protection.

This was spelled out fairly effectively, to a limited extent, in the exemption, section 86.12 of title IX regulations, but once again, this has been an area that there has been very slow action on.

In 10 years 288 requests have been made, and I suppose less than a half a dozen or a dozen have been acted on.

The CHAIRMAN. Thank you. Let me now ask a related question. The present religious exemption in title IX protects only those colleges which are, quote, controlled, unquote, by a religious order. Dr. Hafen, why is that insufficiently broad language?

Dr. HAFEN. Because so many religious schools are not controlled by churches. There is also some problem in even knowing what control means, but the traditional test for that term would suggest financial control, authoritative controls through a church-appointed board of trustees, and so on. But a review of religious higher education in the United States will show that many schools, having serious genuine religious missions verified over many years of operation, are not controlled in that sense. Their boards of trustees may be appointed at a local level, they have diverse funding sources, and there is no necessary connection with a denomination. In fact many church-related schools attempt to be more or less interdenominational, and yet pursue a general mission of Christian education or some other particular general religious approach.

The CHAIRMAN. Dr. MacKenzie, you have indicated that you are not an institution controlled by the Presbyterian Church, like Notre Dame is not an institution controlled by the Catholic Church, although certainly both institutions are very much influenced by their church. Do you care to comment on that question also?

Dr. MACKENZIE. Yes. I think that without your amendment, Senator, it would be highly inequitable, because there are many schools like Grove City College which are pervasively religious, perhaps even more religious than some of the schools who may be controlled by denominations but whose religious influence has declined over the years, even though control may still have existed. So I think it is highly inequitable.

The CHAIRMAN. Let me ask this question. And let's start again with you, Dr. Hafen. If it is part of the religious tenets of a college to segregate blacks and whites, or to discriminate in some other manner, why should that practice be tolerated, much less be subsidized, by the Federal Government?

Dr. HAFEN. Well, if you are talking about race discrimination, that is a very different matter. I do not——

The CHAIRMAN. You are saying that, regardless of the private, religious character of the school, there should be no racial discrimination.

Dr. HAFEN. Oh, without any question, Senator, and my view about this legislation has been an expression of concern primarily about title IX.

I think that race discrimination does not even enter this discussion. One of the problems we have in examining this legislation, however, is that we are not as thoughtful as we perhaps ought to be, about the differences between race discrimination and sex discrimination.

Things do not work very well when we take concepts developed in the context of race discrimination and transfer them to the sex discrimination area.

I think there is far less national consensus about what we mean by sex discrimination than what we mean by race discrimination. The Congress itself exempted women from the draft.

The Supreme Court upheld that kind of distinction. There are distinctions drawn on the basis of sex that are natural, that would never be allowed in the race context, and I think it helps us to remember, we are not talking about race discrimination, at least as far as I am concerned——

The CHAIRMAN. That is precisely why I asked the question, to make sure of that distinction. I did not think that any of you would argue that race discrimination should be protected in any school that receives either directly or indirectly receives Federal funds. I am glad to know you all do agree with that principle.

Dr. HAFEN. The Supreme Court has made that very clear in the *Bob Jones* case.

The CHAIRMAN. I would add that the amendments to this legislation which I have proposed would not exempt schools which have been denied a tax exemption, like Bob Jones University. I think that needs to be pointed out, that we would not tolerate race discrimination in any way, shape, or form.

Let me also ask you this: We are all familiar with the abortion controversy in the context of title IX. You raise that as just one example, the most prevalent example, perhaps, of the dissent, about what is proper on religious grounds, that arises in our society.

But are there any other policies, other differences that are religiously based? You indicated that abortion was just one of many issues about which institutions of higher education can have differing policies based on religious grounds. Could you list some of the other policies which may be affected by a religious exemption in title IX? Could you just share with us some further illustrations of this problem?

Dr. HAFEN. The title IX regulations forbid, even at a religious institution, inquiries into marital status, pregnancy, and so on.

There are many religious schools that regard it as a matter of serious moral principle, that sexual relations should be confined to marriage, and indeed, it is a condition of enrollment at my own university, that students accept a code of behavior in which they commit themselves to live according to such a moral standard.

Is no inquiries are permitted about a student's behavior in that area, it is impossible for us to enforce a standard of morality of that kind.

Similarly, at many of the schools in our association, also for reasons of moral principle, we would object to sex-integrated housing for single students.

Those are two——

The CHAIRMAN. You are talking about housing standards, entrance standards, curriculum standards, dress standards, career counseling, all of these. Your point is that religious institutions may be guided by the particular tenets of the faith of the school in setting policies in these areas, and that these policies may vary somewhat because of the religious belief on which they are based.

Dr. HAFEN. Exactly.

The **Chairman**. You believe this religoously based difference is legitimate? Do you other two agree with that?

Dr. **Nobles**. Yes.

Dr. **MacKenzie**. I would agree and I would also add, Senator, that I believe the whole principle of hiring of faculty is also an area of concern to many of our schools.

In our institution, for example, preference is given in the hiring process to those who share an ecumenical but nevertheless evangelical Christian perspective.

We feel that this is appropriate in our type of institution.

The **Chairman**. I understand. Dr. Nobles.

Dr. **Nobles**. I would certainly reiterate that. This is one of the—actually, to a large extent, the faculty of any institution have within their power, over a period of time, to really create the environment in which the education is given.

Consequently, if the ability of being able to select those individuals of like faith and order, and it is taken away, then the reason for being, for institutions of our type, would cease to exist.

The **Chairman**. My time has expired. Let's turn to Senator Simon next for his questions.

Senator **Simon**. Thank you, Mr. Chairman, and I thank the witnesses. I asked the staff to get me a copy of the House language on religious exemption, and I think we are all interested in protecting religious freedom, and just superficially, it does not, that language does not look bad, but I, frankly, have not looked at it carefully.

I have to say I have some concerns with your testimony. Dr. MacKenzie, when you say "I firmly believe that this Congress should pass strong civil rights legislation", I will exempt Dean Hafen from this question because, if my eyesight is accurate you are probably too young.

Let me ask Dr. MacKenzie and Dr. Nobles: Were you involved in the 1964 civil rights legislation? Did you favor it?

Dr. **MacKenzie**. I certainly did favor it. I happened at that time to be pastor of a church in New York City which previously had been all white, on upper Broadway, up in the Morningside Heights District.

I was very much a part of the process of integrating that church, making blacks, women officers of the church. I very definitely supported the whole thrust of the civil rights movement.

I did not necessarily agree with all the tactics but I certainly agreed with the principle, the moral principle that was being expounded.

Senator **Simon**. Dr. Nobles.

Dr. **Nobles**. I had no active role to play inasmuch as at that time I was not in any policy-making or operative position, but certainly supported the principle upon which the legislation was enacted and the basis for which it was enacted.

Senator **Simon**. If I understand your response—and the three of you correct me—you believe that racial discrimination is wrong and should not be tolerated?

Dr. **Nobles**. Yes.

Dr. **MacKenzie**. And Senator, may I add at that point also, that I believe it is wrong and that when I served in California, I served on the Human Relations Commission out there, and I believe I aggressively sought to correct injustices there.

Senator SIMON. All right. But if I follow your, the response to the question from Senator Hatch correctly, the three of you all happen to be males—believe that sexual discrimination on the part of your campuses is OK. Is that—am I misstating things?

Dr. HAFEN. Yes.

Dr. MACKENZIE. Yes, definitely.

Dr. HAFEN. My own view about my campus, and the campus where I was president, is that sexual equality is an extremely important part of our educational mission. The school where I was president is a coeducational institution. Over 50 percent of the enrollment is female, and I think my record at that school will show very clearly a strong commitment to equal educational opportunity for women.

The things I have said today, Senator, have been limited to circumstances where our interest in eradicating sexual discrimination, significant as it is, and valuable as it is, may collide in certain narrow areas with our interest in preserving religious liberty, because the religious tradition in a variety of churches reflects a sense of gender identification related to family roles primarily.

So, when we start talking about matters of sexual morality, marriage, family life, that kind of thing, then there is a collision between our interest in eradicating sexual discrimination and our interest in preserving religious liberty.

Senator SIMON. Should we not then, as I sense it, and Dean Hafen, you are not opposed to title IX, but to the application in certain cases where religious principles are involved?

Dr. HAFEN. That is right. However, there is an additional area of concern that I have talked about in my testimony and that is the matter of student aid.

That is a different problem from the problem of religious exemption, and there what we are talking about is primarily more a question, not so much about sex discrimination as such, but the question of where the line should be drawn in limiting the power of Federal regulation:

Surely there must be some line someplace, and it would seem to me that when indirect aid becomes the basis for jurisdiction, there is no limit. It is a slippery slope that goes on forever because it is a hard line to draw once you leave the sphere of direct aid.

Senator SIMON. Let me just—I want to get back to that—but it seems to me that rather than passing some legislation that is anemic, that weakens title IX, and weakens title VI, weakens 504 and weakens the other legislation, that we ought to sit down with HEW and say "Let's get our regulations drafted in such a way that we protect religious liberty, but not statutorily weaken things."

Now let me get on to the indirect aid, because I think the analogies, with all due deference to the three of you, I think the analogies you use are not correct.

When you talk about food stamps, Dr. Nobles, no one argued that food stamps were going to be a subsidy to grocery stores.

When you talked about landlords and automobile repair shops, no one talked about student aid as being assistance to landlords and automobile repair shops.

Everyone talks about student aid being assistance to colleges and universities. I just had a meeting yesterday with David Phillips, the head of NAICU. We are talking about the survival of a lot of colleges and universities dependent on the level of student aid.

Now I see Dr. MacKenzie shaking has head. You happen to have a much below average level of student aid at your school, 5 percent Boggs, 15 percent or so student loans.

But that is the exception. That is not the general pattern. And the aid to the students clearly—and you can read the Senate debate on this, and the House debate, clearly was designed not only to assist the students, but as an assistance to colleges.

And that is why, when we provide assistance to students, we think we can also be saying to colleges, this is an assistance to you, we do not want you to discriminate.

I think that is not an unreasonably stand for us to be taking.

Dr. HAFEN. If I may respond to that, Senator Simon.

Senator SIMON. Yes.

Dr. HAFEN. There are many forms of student aid, and many of the aid programs go directly to the colleges and universities. There is a lot of discretion at the administrative level in the colleges about how the money is to be used, how the students are selected, and so on.

Senator SIMON. But let's confine it to Pell grants and student loans. Those are the two big items, and those were designed to aid colleges and universities as well as students.

Dr. HAFEN. But as I pointed out in my testimony, at the college where I served as president for 7 years, we were on the alternate dispersal system.

The students qualified for the aid, the checks went to them, and the students do not have to spend that money for tuition.

They can expend it for their own education-related expenses. And what I have trouble with is the distinction—the principle, if you will—of indirect benefit. And here I am thinking about the future limits on Federal power as much as anything.

If a student uses his Federal grant partly to pay rent and partly to pay tuition, we regulate the college and call it a recipient in that case, but not the landlord. Where is the principle, the legal distinction, that will establish for us a rationale for regarding a college in that instance as a recipient but not the landlord, if the student has used the grant money to pay for education-related expenses at both places?

Senator SIMON. And I may be exceeding my time here, Mr. Chairman. I think the distinction is a very clear one, and that is, the aim of Congress, and obviously the aim of colleges and universities—if you just look at my calendar every day, the colleges and universities coming in to talk to me about student aid—is clearly for colleges and universities as well as students.

I am not having any landlords come in and talk to me about student aid. I am not having any grocery stores come in and talk to me about student aid.

I think it is a fairly clear distinction.

The CHAIRMAN. Senator Simon, your time is up. The concern for many of us last year was that no one was willing to say that this kind of coverage was not intended in legislation proposed to reverse *Grove City College.*

Likewise nobody knows the real meaning of some of the language in S. 431. For instance, the language in section 3, subparagraph 4, says: "Any other entity determined in a manner consistent with the coverage provided with respect to entities described in paragraph (1), (2), or (3); any part of which is extended Federal assistance." I have to say that the meaning of the phrase, quote, "Any other entity", unquote, is a total mystery to anyone attempting to understand this legislation. I have talked to people who are supporters of this bill who assert that this language is intended to ensure that this bill extends Federal regulatory coverage in the broadest possible manner, that this language simply leaves this task to the genius of our Nation's most innovative and creative attorneys. Frankly, I would be very interested in making sure, by writing this legislation very expressly and specifically, that your statements to the contrary are followed.

This is a very technical bill and a very technical area of law. But it will probably be very broadly construed, as civil rights laws should be construed. Yet there is some very, very undefined language in the bill. That expansiveness probably is going to cause everybody who can be listed as a potential recipient, directly or indirectly, of Federal funds, as having much broader liability than I think most people who presently sponsor this bill intend or believe is the case.

Thus, would you work with me to draft language to say that grocery stores, farmers, landlords, and others, are not covered by the any other entity provision in this bill? Otherwise, I think you know as well as I do that they are going to be covered. That is what these witnesses are crying. They would like to see religious liberties protected as one type of the liberties protected in the overall scope of civil rights and other liberties American citizens possess. They believe this because, as I do, they consider religious liberties to be as important as are many other kinds of civil liberties.

Am I correct in stating it that way?

Dr. **Hafen**. Yes.

Dr. **MacKenzie**. Here, here.

The **Chairman**. Yes, Senator Simon, these witnesses—and I agree with them—claim that this bill ignores the rights of religious institutions, and ignores the rights of religious liberty under the Constitution, if read too expansively. This excessively expensive reading is possible with such amtiguous language.

Senator **Simon**. If I could exceed my time for one minute here.

The **Chairman**. Surely.

Senator **Simon**. I think we are in agreement that we have to protect religious liberty, and I am willing to look at any language that does not dilute and weaken the fundamental thrust of this.

We covered that in the House last time—I was the chief sponsor in the House of this legislation last time—by specifically outlining in the Committee report, we do not mean grocery stores, we do not mean—we delineated a variety of things.

I am not opposed to carefully constructed language that makes that clear, but I am not for something that weakens the basic thrust, that says this Nation should not discriminate, and I do not want Federal funds used to assist in discrimination.

I think you and I agree on that.

The CHAIRMAN. We do.

Senator SIMON. I think our panelists also agree on that. Somehow, we ought to be able to fashion that.

The CHAIRMAN. I am willing to work, and work hard, on refining the language so that we pass a bill. I think we can pass a bill that will do basically what you would like to have done in the area of higher education or education per se.

I am willing to work very hard to see that that is done, and I would like to work with you. But, you know, some of the issues that have arisen involve questions like the following. Is the mom and pop grocery store that receives food stamps from customers in payment for produce to be regarded as covered, "in a manner consistent with" the coverage of the *Grove City College* decision that held a school that receives student tuitition payments comprised at least in part of Federal Grants or loans to the student in fact receives Federal funds? Are farmers and ranchers who receive Federal price supports, or crop insurance subsidies, or disaster loans to be regarded as similarly covered? What about the extent of coverage of a private corporation that receives $1 of Federal financial assistance? Is a transferee of Federal Funds from an initial recipient to be covered similarly—again, "in a manner consistent with," coverage under *Grove City College*? Likewise, what is the extent of the coverage of a State agency that receives a transfer of Federal funds from another department or office of that particular State?

I could go on and on with such problematic illustrations. Thus, there is reason for concern by, for example, members of trade associations—just to show you how broad the legitimate concerns are about this bill. They are concerned that aid to the association or one of its members could lead to the systemwide coverage of all other members, "in a manner consistent with," system-wide coverage of higher educational systems as described in one part of the *Grove City College* decision. Likewise, is a landlord "paid" with Pell grant funds? Is he covered? Such questions need to be answered. Thus, clearer, less ambiguous language is a must.

The language in here is so broad, so inarticulately drafted, that, I think, these witnesses are making a very good case that it does infringe upon religious liberties. I fear that we may cast those liberties aside in our zeal to do what, I think, everybody would like to do in the civil rights, that is, to bring about equality of treatment in our society today. Be that as it may, I think, you and I, and some others, in good faith can sit down and resolve some of these problems. I would like to do it. I would like to get rid of this controversy.

Let's turn to Senator Pell for his questions.

Senator PELL. Thank you, Mr. Chairman. I would ask unanimous consent that an opening statement be inserted in the record at a suitable place.

The CHAIRMAN. Without objection, so ordered.

Senator PELL. And I have no questions at this time. Thank you very much.

The **Chairman**. Thank you. Let me just reiterate that what I want to d~~o is~~ to make sure that religious liberty is protected along with all our other cherished civil liberties. It should not be cast aside in our zeal to enact other civil rights legislation. I think those are important too. But, let's not ignore the first amendment and the very important separate civil rights issue of religious liberty and freedom.

I would like to ask you witnesses just a few other questions. You are an important panel of witnesses, and I need your answers on this matter.

Let me address this to you, Dr. Hafen, since you are the dean of a law school. I am intrigued by the procedural issues that might be involved in the religious exemption in title IX. Who, for example, would carry the burden of proof of demonstrating that some title IX rule or regulation is inconsistent with a religious practice? Would the school or the Government have that burden of proof? This is an important legal question, it seems to me.

Dr. **Hafen**. Under traditional first amendment doctrines, Senator, there is a very strong presumption in favor of a religious liberty claim, and it seems to me if there is a good faith claim, that this or that tenet is a religious doctrine, that the Government should defer to that claim under ordinary circumstances.

The **Chairman**. The Government should have the burden of proof? That is what you are saying?

Dr. **Hafen**. Yes. Otherwise, the Government is in a position of determining what is a religious doctrine and what is not. It seems to me that there should be a presumption of validity in the case of a good faith claim.

The **Chairman**. Well, let me ask you this: What about campus-based student organizations, for example, chapters of the Knights of Columbus, which have adopted policies inconsistent with title IX? Should these organizations be protected under a religious exemption, or should merely the college itself be protected?

Dr. **Hafen**. If you are talking about student organizations that have a legitimate religious basis for their existence, and there is no question about that, it seems to me those organizations themselves are entitled to the exemption because they enjoy religious liberty as does any other religious organization.

I would share the same suspicion I would hope others would have, of organizations that call themselves religious when, in fact, they are not.

I think we have to be talking about a truly legitimate religious liberty claim here in order to talk about a serious exemption.

The **Chairman**. If S. 431 were enacted, who would decide whether the practice of a private university—for example, its practice of requiring single sex housing—is, quote, "consistent with the religious tents of a religious organization," unquote?

Dr. **Hafen**. Well, it is unclear who would decide, and, I think, that is part of the problem. Some clarification needs to be given, so that there is direction given to Federal agencies.

The **Chairman**. What are the implications of a Federal officer determining what practices are consistent with a religion's tenets? What would happen if the religion disagreed with the Federal officer's assessment of which practices are consistent with their religion or their religious tenets or beliefs?

Dr. HAFEN. Well, a couple of implications occur to me. One is that in questions of doubt, if the Government assumes the role of making the determination, then the Government is in the position of deciding what is religion and what is not religion, which, I think, is not an appropriate role for Government.

The CHAIRMAN. It certainly flies in the face of the Constitution and established decisions of constitutional law.

Dr. HAFEN. Another implication I see, is that many of the religious institutions we are talking about are small institutions, they are struggling financially, if they have got to hire a battery of lawyers, and struggle through some great administrative proceeding, or court proceeding, to justify their existence, and their continuity of religious interests, that seems to me a very severe blow against their very existence, because so many of them are on the brink now.

So if the burden of proof is on them, that may be a burden many of them simply cannot carry.

The CHAIRMAN. Assuming that the religious tenet amendment passes, protecting the rights of religious institutions, why should a college be entitled, for instance, to an exemption for its abortion or residence policies, if it can demonstrate a sufficient religious basis for these policies, but not if it has adopted such policies on other nonreligious grounds?

Dr. HAFEN. I guess what we are talking about is a definition of religious liberty. That is the interest protected by the first amendment.

My own sympathies would be with institutions who want to establish a concern with moral principle related to sexual promiscuity and abortion, even if it is a matter of moral belief and preference.

But whether the first amendment would protect that kind of claim, I think is not very clear.

Dr. NOBLES. Senator, if I might on that——

The CHAIRMAN. Yes, sir.

Dr. NOBLES. On the original preliminary draft regulations that went out under title IX back in 1974, the provision there for determining that was left to the Secretary of HEW in the preliminary draft.

The final draft eliminated that, pointing out in their analysis, that they realized that that was not a proper governmental function to determine, and therefore, they simply end the regulations that now exist, say that the chief executive officer of the institution should advise the Secretary of the Department of Education as to which tenets are in conflict with the various sections of the regulations as they exist. So there was that, over that period from 1974 to 1975, a complete change, and in the prolog to the final regulations, as adopted, that very issue is addressed at length: at least in that context.

The CHAIRMAN. Dr. Hafen, is it your judgment that an effective religious liberty exemption is constitutionally mandated, or is it just simply good Federal policy, or good prudent public policy? Are there really constitutional ramifications here?

Dr. HAFEN. I think there are clearly constitutional ramifications, and it seems to me that Congress would be well advised to anticipate the scope of a religious liberty exemption under first amendment interpretations, and then establish the exemption according to those parameters.

Otherwise, the extent of the exemption would have to be determined in court.

The CHAIRMAN. My time has expired. Senator Simon, we will go back to you.

Senator SIMON. Just one question to Dean Hafen and Dr. Nobles. Prior to the *Grove City* decision, were you having major problems on your campuses with the enforcement of title IX? Dr. Nobles?

Dr. NOBLES. Not any major problems, no.

Senator SIMON. Dean Hafen?

Dr. HAFEN. I am not sure I understand, completely, the question. There were no complaints on our campus or difficulties with title IX.

Senator SIMON. Well, I think that is the general situation and what we are trying to do is return the law prior to the *Grove City* decision, because we think the *Grove City* decision went contrary to the intent of Congress.

And it is interesting that in virtually all title IX, title VI, all these discrimination cases, that the Government agency and the college and university get together, and they work sensible things out.

I think to some extent we have a spector here that we created, that is not a reality.

Dr. NOBLES. Senator, I would like to respond to that in the sense that when the final regulations were issued in July 1975, our institution requested exemption from 18 of the sections under that.

We have continued to operate on the premise that we were entitled to those because we asked for them as the regulations spell them out.

We have never received approval from HEW, or subsequently, the Department of Education, for those exemptions, but we have operated on the premise that we were clearly within the limits of doing what was spelled out in the regulations, we complied with it, and therefore, we utilized these exemptions.

Now, if we were not operating within that framework, we would have had a great many difficulties.

Dr. HAFEN. Senator, if I could add a comment in response to your question. It is rather clear to me, from the reading I have done, that Congress had an opportunity to adopt institutionwide coverage as an approach, but did not.

The language, "program or activity" is narrow language. I am thinking of the testimony of John Garvey. I do not know if that has been given here or not. Maybe it was just a draft I saw.

He is an attorney with some experience in this area, who has written a very careful analysis of the origin of the use of the term program or activity.

It is very clear to me from the reading I have done that the choice of tht phrase was a conscious choice. But if Congress now chooses to expand the jurisdiction where there is Federal aid, from a particular program or activity to an entire institution, that is certainly within the province of Congress to make that determination.

But it simply is not accurate to assume that what is being done is simply a return to what existed before. I will not take time because time is so limited now, but, I think, that point can be well documented.

Even the term,."program or activity," is a narrow term. I mean the word "tree" just does not mean the same as the word "forest," it really does not, and, if Congress had intended to regulate entire institutions, that could easily have been done.

Senator SIMON. I would suggest, you may be able to document the narrowness of—you can document just about anything, if you want to, but, I think, congressional intent was clear, and there, if you will read the debates in the House or the Senate, or talk to my colleagues who were here when it originally passed. Senator Pell would be a good example.

I think the intent was the broad intent. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Senator Pell, do you have any other questions?

Senator PELL. No. Thank you very much.

The CHAIRMAN. Senator Dodd.

Senator DODD. Well, Mr. Chairman, I have come a little bit late down here this morning, and let me, if I can, first of all apologize to the witnesses.

The CHAIRMAN. I understand. We are happy to have you here.

Senator DODD. In order to expedite matters, why don't I submit some written questions, rather than trying to take any more time.

The CHAIRMAN. That would be fine. I, too, have some additional questions because I want to cover this issue fully. This is an important hearing. It may be the last chance we have of exploring these issues with these witnesses.

If we continue, as Senator Simon suggests, to see aid given directly to a student as aid to a college, making independent schools unable to accept these students in order to preserve their independence, as you have indicated, may be the case. Dr. MacKenzie, are we then not cutting back on these students' rights of equal access and opportunity to attend a wide variety of educational institutions? Both you and Dr. Nobles have indicated that that is so.

Dr. MACKENZIE. I believe that is true. Grove City, of course, is one little drop in the bucket. In our instance, we do not believe it has shut anybody out because we have managed to put private money in place to replace the Pell grants.

But I am sure on a broad scale, that it would definitely compromise the rights of individual students to choose a school which they chose to go to, which they would like to go to.

The CHAIRMAN. Do you believe the same way, Dr. Nobles?

Dr. NOBLES. I would add one word of further explanation. With regard to Senator Simon's question, I think, there is the basic differentiation in this kind of aid, in going back to the World War II GI bill, in which the Government paid directly to the institution tuition money, and then they paid to the student, directly, money to live for living expenses.

And the money that went directly to the student then, I do not believe in any way, would have been assumed to be aid to the colleges or to the universities.

So, that, I think, with this, with this delineation, that if all student aid is considered institutional aid, I think, that it would have a profound effect on, certainly, 800 to 1,000 institutions in this country.

Dr. **MacKenzie**. Mr. Chairman, could I add, in line also with Senator Simon's earlier comment, that we at Grove City, at least I at Grove City, would prefer to go out of business, Senator Simon, if I felt that we had to depend on the Federal Government for your subsidy, for your generosity.

I disagree with John Phillips' perspective that aid should be to the institutions. I believe aid to individual students is very appropriate in our land, but I would just like to go on record, that I personally disagree, and we at Grove City have managed to replace Pell grants with private money.

We are not at risk for survival, and there are some of us out there, across the country, who still feel we would like to stand on our own feet, independent of Government resources.

The **Chairman**. I might add that there are a lot of people who have asked why, in a bill designed to protect civil rights, it is not desirable also to protect religious freedom as a civil right as well as other important civil liberties. It seems to me that religious liberty is certainly equal to any other civil right in our society. Some people even believe that religious freedom is superior to any other civil right in our society, particularly because we are a free and religious country.

In other words, the basic concern I have is this: How can it be said that by adding a religious tenet exemption to this legislation we will diminish the protection of civil rights, which I know is the intent of the authors of both S. 431 and S. 272?

I think everyone agree that we do not want to violate civil rights. We do not want to make it difficult to enforce civil rights laws in our society. We want civil rights enforced.

Dr. Hafen, you wished to say something. Please continue.

Dr. **Hafen**. Senator, I would like to respond to your question a moment ago about student aid. When Senator Simon said that it was the intent of student aid to, in his mind, assist not only students but educational institutions, the question came to my mind, what are we going to do if student aid becomes a basis for Federal jurisdiction under this statute, and then in the interest of preserving and encouraging private education in the future. Other forms of indirect aid are created. There just seems to be increasing interest in preserving private education.

Suppose the Government should enact tuition tax credits or voucher systems to aid students, or their families, to make a free choice about where they will attend college, or, some other school. That is precisely the same kind of thing as student aid, and the point that I have tried to make in my testimony is, that once you shift from direct institutional aid to student aid or aid to the family, of course you are benefiting, indirectly, the schools those students attend. That is obvious to anyone.

If the jurisdictional line is extended from direct aid into any of those indirect categories, I think it is going to be very difficult in the future to say that student aid could be the basis for Federal regulation but a voucher system, or a tuition tax credit, or even a tax exemption, a charitable educational exemption, which is obviously a benefit also, would not be the basis for jurisdiction.

It is important to preserve some kind of bright line that will aid us to preserve the distinction, long term, between the public and private sectors.

The CHAIRMAN. All three of you have been very articulate witnesses. We have already taken much of your time. Nevertheless, I have three other questions. I think they are important questions which need answers.

First, in your judgment, should it make any difference whether 5 percent of the students at a college receive Federal scholarship assistance, or 70 percent of the students?

Does your perspective on the advisability of this proposed legislation rest on this at all?

Dr. NOBLES. I would not. I would not——

The CHAIRMAN. Dr. MacKenzie and Dr. Nobles are responding negatively. How about you, Dr. Hafen?

Dr. HAFEN. No; we are talking about a matter of principle—what kind of aid is it? That has been the thrust of my testimony, the distinction between direct and indirect.

I might add, however, that it seems to me that the Congress could also talk about some kind of de minimus exemption. That is, that the amount of aid received directly, or indirectly, could be the basis for some kind of exemption, just as small businesses are occasionally exempted from regulatory treatment; but such an exemption has not been suggested, to my knowledge, yet.

In this debate, we are talking more about direct versus indirect.

The CHAIRMAN. Let me ask just one other question—the basic question that I hear raised so frequently in connection with this particular issue. If you do not discriminate at your institutions—and all three of you have asserted that you do not, nor have you ever been accused of discrimination—what is it that you are so worried about in being covered by title IX? Is this simply a matter of doing a few more hours of paperwork? What is the bottom line? Why are you concerned? Let us start with you, Dr. Hafen, and go right across the table in turn.

Dr. HAFEN. I would say that there are two primary interests. One is preserving religious liberty as has been previously addressed here this morning, and the other is preserving institutional independence which allows the pursuit of distinctive educational missions.

The CHAIRMAN. Dr. MacKenzie?

Dr. MACKENZIE. I would say the same, that we are preserving our religious liberty, the right to maintain our own value system on our campus.

The CHAIRMAN. You believe that liberty might be interfered with by the language in some provisions of the proposed bills?

Dr. MACKENZIE. Very definitely; and I think there are events across the Nation, that have taken place in the last 10 years, that would be a warning to us. But second, also, we manage to provide for students of modest means, an education at a very low cost.

We are persuaded, Senator, that if we have to jump through all the hoops that the Government is going to put us through, that we would have to dramatically increase the tuition and charges to our young people.

The CHAIRMAN. And that would not necessarily increase anybody's civil rights.—In fact——

Dr. MACKENZIE. No, not at all.

The CHAIRMAN [continuing]. You believe it would diminish your students' and your institutions rights?

Dr. MACKENZIE. Particularly where civil rights, the civil rights of every student on our campus are well safe-guarded, not because the Government has control of us, but simply because of our conscience.

The CHAIRMAN. Dr. Nobles.

Dr. NOBLES. I would concur in what both of the previous speakers have said, and add one further thing, that any time you have this potential, you in essence have the sword of Damocles hanging over your head as an educational administrator.

We spent 8 years in and out of court on one case, of a claim of discrimination, which was ultimately overthrown, the judgment was in our favor, but only after we had held hearings, we had gone to Federal District Court, we had gone to the Fifth Circuit Court of Appeals, we had expended the necessary legal fees, and all of the legal fees for the complainant had been borne by the Federal Government.

And that obviously, the small colleges and universities in this country simply are in no position to take on an illegal battle from the standpoint of finite resources, of those kinds of claims that can be entered, and you will have to live with every day.

The CHAIRMAN. Are there are any further questions? Senator Dodd.

Senator DODD. I will contradict myself, having said I would submit some written questions. If I could just take a couple of minutes.

The CHAIRMAN. Certainly. We will keep the record open, though, for questions to all witnesses. This is a serious issue and not all of our colleagues have been able to attend this morning.

Senator DODD. Let me pick up on the chairman's last point, and, if I could, let me just ask the three of you this very quickly. You are certainly aware of the fact that there are institutions, private institutions—aside from any legal determination—that have been the recipients of either indirect or direct Federal financial assistance, that have in fact discriminated against the student population. You would not argue with that, I presume.

Dr. MACKENZIE. No.

Senator DODD. We certainly understand that while we pass laws around here, we do not necessarily pass them to apply to the majority of people, but to the minority that would violate the rights of others.

So what we are trying to do here is not necessarily impose additional burdens on law-abiding citizens or institutions which comply because of their conscience, but rather because there are institutions that do not live up to that standard. The necessity for legislation is based on that principle, rather than trying to burden institutions, which have already been doing that which they would do with or without that principle. Do you disagree with that?

Dr. HAFEN. I do not disagree with it, Senator, but much of what we have been discussing this morning has talked about the need for limits; even on the desirable objective you have identified, there is a need for limits on governmental power, and that those limits can be identified in talking about religious interests or independent higher education.

There is a point at which the educational missions pursued by private schools are threatened by not just the paperwork, but the whole—the spirit, the policy determinations, the monolithic attitudes about the nature of the educational enterprise that are reflected in legislation of this kind.

And as long as we are conscious of that, then some rational line can be drawn that limits Federal power and still recognizes those interests.

Senator DODD. As one who is supportive of the legislation, I would say simultaneously and I do not think in any contradictory way, I am sympathetic to what you are saying.

I think we all have to be conscious of the fact that while we are trying to deal with the specific problem that occurred, fortunately in not a majority of institutions, but nonetheless existed, we also must be sensitive that there may be problems that we are creating, unwittingly, down the road.

The question becomes whether or not we should refuse to act, deal with the known problem that does exist, unfortunately, for fear that we may be creating additional problems that we cannot yet determine, and I have reached the conclusion that confronted with that choice, it is wiser for us to act, hopefully in an intelligent and rational enough way so that we do not violate or infringe upon the very things you have discussed, and your colleagues have as well in the brief time that I have been here.

That if we have, hopefully, we would have enough intelligence to step in and correct that problem, so it would emerge at some subsequent point. But I would hope that we would not refuse to act on the known problem that does exist. Do you disagree with that?

Senator DODD. Would you disagree with that?

Dr. HAFEN. I would not disagree with it at all. In fact I would like to cheer, that Congress is being far more deliberative this year than was the case last year, about this problem.

What has been going on in the House committees and what is going on here, tells me there really is a good-faith effort to do just what you are saying, Senator Dodd, and that is, try to be sensitive to the point at which our determination to eradicate discrimination will harm interests we would want to protect if we understood what they are.

The CHAIRMAN. Basically you have been saying that we should pass laws to prohibit the civil rights violations by a minority of institutions. I agree with that.

But what you are also saying is this: If we could exempt unoffending institutions who do not want Federal aid, who have not discriminated, and who want their educational policies to be consistent with their religious beliefs and yet, if we could cover those institutions who do discriminate, that greater precision and fine-tuning is a preferable legislative goal.

That is basically what I said previously to Senator Simon. I will say it to you, Senator Dodd and Senator Pell as well: I am interested in overruling Grove City and applying title IX institution-wide in higher educational institutions thus, I would be interested in joining a good faith effort to resolve some of these language conflicts that cause concerns about also protecting religious freedom and liberty.

Senator DODD. I appreciate the chairman's comments, and I would take it a step further. What I understand, now, is that it is the individual student aid question, the Pell Grant assistance, which—and I did not hear all of you—but Dr. Hafen, your concern is that that should not necessarily apply and be considered as Federal aid, thereby triggering the prohibitions that would be included in the legislation. Is that correct?

Dr. HAFEN. That is correct and it may be helpful for me to point out, that the number of institutions who receive only indirect student aid is a very small number.

So you are talking about a small group of colleges who have refused for years to accept Federal aid, for all the reasons we have been discussing this morning.

But to find a school that does not have one student on a GI bill or Pell Grant, you have got to look pretty hard.

Senator DODD. Yes; is it not counterproductive in some ways—I heard your response to Senator Simon—to move away from, say, the Pell Grant Program, given the obvious financial benefit to the individual in the first case, because the cost, I presume is less—how substantially less I do not know—than it would be to go other, private routes.

Indirectly, the institution is being deprived of those resources as a result of that assistance, and what concerns me is it has a counterproductive feature to it that is harmful to the university as a whole, the college as a whole.

Dr. HAFEN. Well, think of the family that wants to send their children to a private college of the kind that we are talking about.

How many times do they have to pay for that education? They are paying for State universities through those taxes and they are paying tuition at the private school. In addition they are paying Federal taxes that finance the grants, and if, in order to remain free of governmental control the schools like Grove City and others, have got to establish their own student aid programs, then the parents have paid four times for the education of the student.

Thus, the existence of the private sector schools is very much at stake. Now it may be, that if the concern is that people assume that student grants are spent for tuition, maybe there should be some grant program authorized that is not spent for tuition at all.

In reviewing the circumstances with my own financial aids officer at the college where I was president, I was told that the students are required to put up enough of their own money, that it would be quite feasible that a student could receive a grant, use all of the grant money for off-campus expenses that are education-related, and use his own money to pay for tuition.

In that kind of a case, is that Federal aid to an institution?

Senator **Dodd**. I would say yes. I mean, I think that we do that in a variety of different areas—the FMS, the credits—where we provide money to a country. We do not give them military assistance, but we provide them assistance in a whole host of other areas, which then frees up their resources to be able to go out and purchase, say, military equipment.

So it is not direct military assistance, but I have always felt in a sense it was indirect aid in that regard, because we were relieving them of the burdens that they would otherwise have to assume themselves, prohibiting them to do other things.

Dr. **Hafen**. But is not the same thing true in the form of all indirect benefits, everything from tax policy to tuition tax credits, voucher systems——

Senator **Dodd**. Well, I do think you can cross a line at a certain point.

Dr. **Hafen**. Yes; and it is that line that we are talking——

Senator **Dodd**. In that situation which you have identified, if the Federal Government were paying for the housing off campus, for the transportation of that student to get to college, for a clothing allowance—let's assume a whole bunch of different materials that he or she would use in the preparation for their coursework, but not for the tuition to go to that college—I think in that case is would, in my mind anyway, fall under the category of indirect assistance.

Dr. **Hafen**. Do you not think it is also indirect assistance to the landlord and the grocery store where the student is spending the money he did get from the grant?

How do we rationally distinguish between the school and the private business community?

Senator **Dodd**. Well, in that case I think there is enough of a relationship, the proximity of the relationship, in terms of the tuition and the cost that the institution is assuming, that they relate to the costs that the Federal Government is assuming, and are close enough that they would fall into that window of assistance.

But I thank you, Mr. Chairman.

The **Chairman**. Thank you, Senator Dodd. I want to thank each of you panelists here today.

Senator **Pell**. Excuse me; I just would like to ask one further question.

The **Chairman**. I am sorry, Senator Pell. Please do so.

Senator **Pell**. I am very delighted to be here to see the president of the famous Grove City College, and as I understand it, the basic problem you have is not whether you limit certain activities only to men, but the very thought of filling out the Federal questionnaires. Is that what bothers you?

Dr. **MacKenzie**. Well, it was not merely the filling out of the questionnaires, Senator. The questionnaires that initially crossed my desk, I would have to sign that we would agree to abide by all existing Government regulations and all future amendments and interpretations thereof.

Here is a school that for 100 years has not taken Government funding as a matter of conscience, now being asked to turn over its whole future, to write a blank check in effect to the future of the school, and where we consider our religious principles so terribly important to us, we felt threatened.

Senator PELL. You say you have not accepted Government money for 100 years. There is nothing to prevent you from going on another 100 years and not accepting any Government money, or not having your students accept any Government money.

Dr. MACKENZIE. Well, this is what we have tried to do. When the Supreme Court ruled that Pell Grants were government assistance, we no longer accept students who take Pell Grants.

Senator PELL. But there is no reason why you cannot continue to operate without Federal funds.

Dr. MACKENZIE. We are trying to distance ourselves from Government but we do not know how. With this legislation, it does not look as though we can distance ourselves at all.

Senator PELL. But if you decline to take students who take Pell Grants and decline to accept money from the Federal Government, I do not see how the Federal Government can touch you in any way.

Dr. MACKENZIE. Well, Senator, if I may respond, we were notified, I believe it was in 1976 by the Internal Revenue Service, that tax-exempt status was now considered an indirect benefit.

Our concern is, will not some Federal dollar be traced to our campus which will force us to jump through Government hoops?

We respect our Government, we are a flag waving institution, but we would like to be able to stand on our own feet without taking taxpayers' money and taxpayers' interference.

Senator PELL. And so the nub of the problem now is whether you keep your tax exemption?

Dr. MACKENZIE. No, that is not—the notice went out in 1975 or 1976, but we never heard anything more about it. I do not know where that stands, Senator.

The CHAIRMAN. What Dr. MacKenzie is saying is that the famous 1972 case of *McGlotten* v. *Connally* held that the provision of a tax deduction for charitable contributions constitutes a grant of Federal financial assistance within the scope of the 1964 Civil Rights Act. Thus, it is almost impossible for any religious institution not to be subject to the Federal Government's authority trigger, with all the accompanying rules and regulations, which may conflict with their religious tenets, their religious values, and their church's constitutional guarantee of freedom of religion.

That is the major problem. There are only about 26 such schools out of the 5,000 colleges in this country. Dr. MacKenzie is saying that it is a matter of principle to his Presbyterian school, which is not controlled by the Presbyterian church and therefore is not exempted under Title IX, that they not be required to comply with current Government rules and regulations and those which may come in the future which conflict with their religious values, their religious tenets, and their religious beliefs.

Senator PELL. But then would not I be correct in saying that if they accept the loss of their tax exemption, do not take any students who have Pell Grants, do not accept any GSL, that they could still operate?

The CHAIRMAN. I do not believe that is possible under these bills. These bills would trigger liability and these 26 schools would have tremendous responsibilities under them.

Dr. MACKENZIE. That is the Damocles——

The CHAIRMAN. There are those who argue that this is not the case; but, if you read the language, it is very broad.

Dr. MACKENZIE. That is the Damocles sword we feel hanging over us, Senator, and therefore, we are terribly concerned.

Senator PELL. Thank you.

The CHAIRMAN. I would like to make one other point on that; Section 3 of S. 431 says, "For the purpose of this title, the term 'program or activity' means all of the operations of a corporation, any other entity, any part of which is extended Federal financial assistance." That covers everything. And, of course, add in *McGlotten* v. *Connally,* which says that a tax exemption triggers liability under the 1964 Civil Rights Act. That could conflict with these schools' religious tenets and religious freedoms. That is what you are saying, isn't it Dr. MacKenzie?

Dr. MACKENZIE. Yes, sir Absolutely.

The CHAIRMAN. I want to thank all three of you. You have been very articulate witnesses who have represented your points of view very well. I think your points of view cannot be simply ignored. Religious freedom is a civil right that cannot be ignored. In our zeal to provide for a broad definition and enforcement of civil rights, we cannot ignore the civil right of religious liberty.

Senator PELL. Mr. Chairman, before you quit, I am having an argument here with my staff. I wonder if the witness could submit for the record a memorandum showing me why you could not operate, if you are willing to accept no tax exemption, no Government aid to any of your students, GSL or Pell grants, no Government money in any form. I would like to have a memorandum from you, explaining why you believe you could not operate.

The CHAIRMAN. Aren't you asking for something that is in excess of what anybody has to get? You are saying that if these schools do not want any tax exemption, which all religious institutions in our society have a right to have, they might still be able to exist, and so be it. Even then, Senator Pell, you cannot be sure that some other regulations, such as divisions relating to interstate commerce, might not be applied to view indirect aid as aid directly to these institutions, thereby bringing them within the ambit of Federal regulatory power thereby limiting their constitutionally guaranteed freedom of religious belief.

Senator PELL. But the question I just asked a few moments ago was exactly that and, I thought, either the chairman, or Dr. MacKenzie said that they could not operate if all these conditions were filled.

Dr. MACKENZIE. Mr. Chairman, could I comment on that?

Senator PELL. Then could we agree that you could operate if you took no Federal funding, lost your tax exemption, and had no Federal funds guaranteed to your students?

I am not saying that is a very desirable thing to do, but technically, you could operate.

Dr. MACKENZIE. We might survive, we might survive, but I would——

Senator PELL. No, just legally; you would not survive in fact. This is a theoretical question. But legally, you could survive?

Dr. MACKENZIE. Probably legally, but I would also submit, Senator, that that might raise questions of whether the government then is discriminating against an institution such as ours.

Senator PELL. Thank you very much.

The CHAIRMAN. Thank you, Senator Pell. We can all see that this is not as simple a problem as it has been painted. You witnesses have made a good case that, if we pass the proposals to override Grove City College, we are going to broadly expand civil right laws, and, in the process, ignore religious rights and freedoms of these educational institutions. I think that is an important point. I hope that my colleagues will consider this issue seriously.

Again, thank you so much. Your testimony has been very articulate. We appreciate the efforts that you all have made to be here and your responses to our questions.

Our next panel's testimony is equally important. We look forward to hearing them as well. We have Dr. Bernice Sandler, the American Association of Colleges and Universities and Education of Women, here, in Washington, DC. Dr. Sandler has appeared before the Subcommittee on the Constitution. Donna Shavlit is the director of the Office of Women in Higher Education of the American Council of Education, here, in Washington, DC. We also have Prof. Edward Gaffney, who is the professor of law at Loyola University in Los Angeles. Professor Gaffney, I might point out, is the author of an outstanding book on a subject related to today's hearing, entitled, "Government and Campus: Federal Regulation of Religiously Affiliated Higher Education.

We are pleased to welcome all of you before the committee. It is good to see you again, Dr. Sandler, and Miss Shavlit, it is good to see you here, and also you, Professor Gaffney. We will start with Dr. Sandler.

STATEMENT OF BERNICE SANDLER, AMERICAN ASSOCIATION OF COLLEGES AND UNIVERSITIES AND EDUCATION OF WOMEN, WASHINGTON, DC; DONNA SHAVLIK, DIRECTOR OF THE OFFICE OF WOMEN IN HIGHER EDUCATION, AMERICAN COUNCIL OF EDUCATION, WASHINGTON, DC; AND EDWARD McGLYNN GAFFNEY, JR., PROFESSOR OF LAW, LOYOLA COLLEGE, LOS ANGELES, CA

Dr. SANDLER. Let me get my title and organization straight for the record. I am Dr. Bernice Resnick Sandler. I direct a project on the status and education of women at the Association of American Colleges.

I have probably been involved longer with title IX longer than anybody else, since I testified on the orginal hearings in 1970, and I also worked for Representative Edith Green who was title IX's prime sponsor.

Before I go into an abbreviated part of my testimony I just want to say a couple of things in response to the three gentlemen who preceded me.

I was quite puzzled to hear that the Civil Rights Restoration Act being referred to as a new law. Its purpose is to restore the laws to the way they were enforced since their inception, and some of those laws, title VI, for example, goes back to 1964. The horrors that they describe I have not seen happen, and indeed, when Senator Simon asked Mr. Nobles about the problems they had had with the Government, he did respond that that had not been such a problem for him.

I was also surprised to hear that coeducational dormitories are required. If one reads title IX, there is a clear exemption saying that coeducational dormitories are not required under title IX.

And on the issue of indirect aid, that was part of the *Grove City College* decision which nobody mentioned in this context. It was a nine to zero unanimous decision on part of the Court that aid to students, indirect financial aid, any financial aid to students is assistance to the institution.

I think also the supporters of the Civil Rights Restoration Act have made it very clear that this law, the new act, should not apply to farmers, or retailers, or mom and pop stores, or landlords.

You have already heard a good deal about why the Civil Rights Restoration Act, in previous hearings, is sorely needed by American schools if women and girls are to have the same opportunities that are the birthrights of their brothers. And I have appended to my testimony an extensive list of practices that are now legalized, and will remain so until the Civil Rights Restoration Act is passed. The purpose of that act is to restore to the Nation nothing more, and nothing less, than the protections that once existed under title IX, title VI, section 504, and the Age Discrimination Act.

This act is not the forum to make changes in these civil rights laws. Some people have tried to use the Civil Rights Restoration Act as a vehicle for their own agendas.

I am not here to testify on the merits of those agendas. Certainly these agendas could be drafted as separate legislation rather than being hastily added to and weighing down the Civil Rights Restoration Act.

But I do want to talk specifically about the implications of what might happen if two such agendas are grafted onto the act.

First, let me talk about the expansion of the religious exemption contained in title IX. Title IX, as you know, currently exempts educational institutions which are controlled by a religious organization if the application of title IX, "would not be consistent with the religious tenets of such organization."

The exemption is limited and applies only to those parts of the title IX regulation which conflict with the organization's religious tenets. It is not a blanket exemption from the other requirements of the law. For all practical purposes, the exemption applies primarily to colleges and universities

Under this existing religious exemption, Catholic colleges can legally discriminate against students who are pregnant, or who terminate a pregnancy through abortion.

They can even refuse to admit a student who has had an abortion and they can treat women already enrolled, who have an abortion, in any way that is consistent with their religious beliefs. The law allows that.

In contrast, schools without that exemption are not allowed to treat pregnant students, or those who choose to have an abortion, any differently than any other students with a medical condition.

Similarly, a school controlled by a fundamentalist religious organization which believed that the Bible prohibited men and women from bathing together, would be exempt from any title IX requirements about coeducational swimming instruction.

Now in order for a school to obtain this exemption, it merely writes the Assistant Secretary that it is controlled by a religious organization and it identifies the policy or practice required by title IX, and identifies the tenet of the religious organization with which it conflicts.

What has happened since 1972? No school, not one, which has requested this exemption, and provided this information, has ever been turned down.

Indeed, the Office for Civil Rights has issued a memorandum recently, specifically instructing its personnel to accept, at face value, and without challenge, or investigation of the assertion that a school is indeed controlled by a religious organization.

So one can hardly call the requirement of writing a short letter a Federal intrusion into the autonomy of an institution.

It is certainly a good deal less than what the IRS requires of religious organizations when they request a 501(c)(3) status in order to exempt them from income tax.

Moreover, it is difficult to see what currently existing problems make this amendment necessary. Certainly there has been no school that has litigated on this subject in the more than 13 years that title IX has been in effect.

The proposed change to title IX is not a clarification of the Supreme Court's decision. This religious exemption is a new and broad exemption which would greatly expand the number of schools who claim exemption from title IX.

A school would no longer need to be a bona fide arm of a religious organization. It need only be affiliated, no matter how loose that affiliation is. About 25 percent of the more than 3,000 institutions of higher education are affiliated, and fewer than one-third of these have sought to use the exemption.

Moreover, the term affiliation is not a technical term easily defined. It does not, for example, require that the school have the same purpose or agenda as the religious organization.

Affiliation ranges from control by the religious organization to a very loose arrangement which may be as minimal as having one or two members of the board of trustees be from a particular religious group that founded the school originally.

Now the House Committee bill claims to restrict the efforts, the effects of changing this religious exemption, by requiring that the religious tenets which form the basis of the exemption be a, "integral part", of the operation of the covered educational program.

But the word integral is not defined. It is vague terminology. I too care about the long reach of the Federal arm, and this language would—the determination of what integral meant and what affiliation meant would be up to Federal officials, would be up to them to determine which religiously affiliated organizations were eligible, and to determine just what the words "integral part" mean. The broad authority granted to Federal officials is thus increased and does indeed pose a danger to those concerned about the freedom and independence of the country's religious groups.

One could expect substantial amounts of litigation, new litigation from both civil rights groups and from religious organizations. Let me give you an example.

A school seeking to continue a discriminatory policy might deliberately seek out a religious affiliation, perhaps by merely setting up an internship program with a religious organization. Does that constitute affiliation and who would decide? That would land us straight in the courts again.

Such a broad exemption—or religious organizations is simply unprecedented in the history of civil rights legislation. The only such exemption, and a narrow one at that, appears in section 702 of title VII of the Civil Rights Act, whereby religious organizations, including schools, are allowed to discriminate in employment by giving preference to members of the same religion.

Contrary to what one of the gentlemen said, title IX would not change that right to discriminate in favor of members of one's religion in those institutions.

In contrast, if this amendment expanding the religious exemption is allowed, it will permit schools with the most tenuous and vague religious, "affiliations", to discriminate in admissions and rules requiring marital and parental status, regarding marital and parental status of students and employees, and even in providing access to particular courses, or extracurricular activities.

For example, an institution could say that its religious tenets require married women not to work in order for them to make a religious home.

Or to say that it is not appropriate for women to participate in some athletic activities. This amendment, if approved, would greatly reduce the protections that women students and employees have had under title IX.

The second issue I want to talk about today is that of abortion, but only insofar as it has become an issue in the Civil Rights Restoration Act.

This is not the time or place to discuss the merits or demerits of abortion, but it is the time and place to discuss how the particular proposed amendment to the Civil Rights Restoration Act would affect the educational opportunities of female students.

Opponents of abortion have attempted to inject issues involving abortion into the Civil Rights Restoration Act. Again, let me be clear, I do not want to talk about the issue of abortion per se, but only to point out what might be legal should this amendment be enacted.

The proposed amendment would overturn longstanding title IX regulations which prohibit covered institutions from discriminating on the basis of pregnancy-related conditions including abortion.

The regulations are not pro-abortion. They merely ensure that pregnant students, or those that choose to have abortions are not treated any differently than students with other medical conditions.

There is a long history in education of denying educational opportunities to employees and students who become pregnant.

They have been excluded from classes and from employment, and while we like to think that this does not happen anymore, last year, a young woman who became pregnant was refused membership in her high school's honor society.

And just as out of wedlock pregnancy has been used as a litmus test for morality, a woman's choice to have an abortion, a right which the Supreme Court has upheld, has also been used as a judgment on her morality.

Thus it is not beyound the realm of possibility that a school board or other school administrators could indeed decide to exclude or penalize students who have had abortions, should this amendment be included in the Civil Rights Restoration Act, other possibilities are as follows.

Students could be expelled or suspended not only for having an abortion, but even for seeking information about an abortion.

Abortion could become a test for admissions. Schools could require sworn statements from women students, as a condition of admission, that they have never had, or will never have an abortion.

Men students could be required to swear that they, too, will never assist any woman, student or otherwise, in obtaining an abortion.

Students who choose to have an abortion could be prohibited from living on campus or joining honor societies or participating in athletic programs. They could even be prohibited from graduating.

Students in need of post-abortion counseling could be denied access to the health center or other institutional counseling services.

A student who had been gang raped at a fraternity party—and we are now preparing a report and we have identified over 50 such instances without looking very hard. A student who was gang raped at such a fraternity party or who was a victim of incest, could be told she would be expelled if she had an abortion. Women who use their medical insurance for a D&N procedure, a procedure which also can be used as an abortion, might be required to swear, or otherwise prove, that they really did not have an abortion and needed the procedure for other reasons.

Pregnant students and employees could be forced, against their will, to have counseling against abortion.

Women will not be protected against any of these actions if this amendment to the Civil Rights Restoration Act is enacted.

Title IX has been controversial, but contrary to myth, it has not caused hardship to the educational community. Despite dire predictions, no school has abolished its football team, nor are schools drowning in paperwork.

Indeed, the only paperwork that one has to do if one is not accused of discrimination is to sign an assurance, that one time assurance—not every time you get a grant but you sign it once, that says, we do not discriminate and do not plan to discriminate.

Federal funds should not support discrimination in any form. One of the myths about title IX is that the Government forces institutions to take specific actions.

No institution is forced to do anything to end discrimination unless it voluntarily accepts Federal funds. It is in a sense a contract with the Government, a contract to end discrimination that is a condition of receiving the Federal dollars, and even then, institutions subject to title IX are not told what to do, but merely, to treat women fairly.

They are not told whether to have an athletic program, or not, but merely, that if they have such a program, indeed, they must treat women fairly within that program.

Few schools at any level have ever seen an investigator from the Department of Education's Office for Civil Rights.

Less than one percent of the Nation's schools and colleges are likely to see such an investigator in the near future.

Most of the changes that have occurred, and certainly they have been major changes—most of these changes have occurred because institutions are willing to obey the law, and not because there is a Federal investigator at their door.

Having a law in place made it possible for institutions to move forward and provide greater equity for their students and employees.

Weakening civil rights legislation, weakening the Civil Rights Restoration Act, can only lead to backsliding and a weakening of the will to change.

The Association of American Colleges with nearly 600 member colleges has a longstanding commitment to ending discrimination against women and other groups, and strongly urges passage of the Civil Rights Restoration Act as it was introduced. Just as Susan B. Anthony once said, "Men, their rights, and nothing less. Women, their rights, and nothing more," so it is with the Civil Rights Restoration Act. We want nothing less and nothing more; simply, we want those rights that were in place before the Grove City College decision. Thank you.

[The prepared statement of Dr. Sandler follows:]

TESTIMONY ON
THE CIVIL RIGHTS RESTORATION ACT
S. 431

U.S. Senate Labor and Human Resources Committee

September 20, 1985

I am Dr. Bernice Resnick Sandler, Director of the Project on the Status and Education of Women at the Association of American Colleges, and a former Chair of the Presidentially appointed National Advisory Council on Women's Educational Programs. I have been involved with the status of women in colleges and universities since 1969, and have probably been involved with Title IX longer than anyone else, having testified at the original 1970 hearings that led to its passage and then working for Representative Edith Green who was Title IX's prime sponsor.

You have already heard a good deal about why the Civil Rights Restoration Act is sorely needed by American schools if women and girls are to have the same opportunities that are the birthright of their brothers. As a result of the U.S. Supreme Court decision in Grove City College v. Bell, many of the discriminatory policies which were once prohibited by Title IX are once again legal. Because institutions are now prohibited from discriminating only in Those ~~the~~ programs directly funded by the federal government, and because most college and university programs are not directly funded by the government — only 4% of federal campus dollars goes toward the funding of specific programs — institutions can once again bar women from crowded classes; deny women athletic opportunities; exclude women from prestigious honor societies; and treat women differently in campus rules and regulations. I have appended to my testimony an extensive list of practices that are now legalized and will remain so until the Civil Rights Restoration Act is passed.

The purpose of the Civil Rights Restoration Act is to restore to the nation -- nothing more and nothing less than the protections that once existed under Title IX of the Education Amendments of 1972; Title VI of the Civil Rights Act of 1964; Section 504 of the Rehabilitation Act of 1973; and the Age Discrimination Act of 1975. The Act is not the forum to make changes in these civil rights laws.

Some people have tried to use the Civil Rights Restoration Act as a vehicle for their own agendas. I am not here to testify on the merits of those agendas -- certainly these agendas could be drafted as separate legislation rather than being hastily added to and weighing down the Civil Rights Restoration Act. But I do want to talk specifically about the implications of what might happen if two such agendas are grafted on to the Act.

First, let me talk about the issue of the expansion of the religious exemption contained in Title IX. Title IX currently exempts educational institutions which are controlled by a religious organization if the application of Title IX "would not be consistent with the religious tenets of such organization." The exemption is limited and applies only to those parts of the Title IX regulation which conflict with the organization's religious tenets — it is not a blanket exemption from the requirements of the law. For all practical purposes, the exemption applies primarily to the postsecondary level. (Private elementary and secondary schools run by religious organizations do not receive federal aid because of the Constitutional separation of church and state, so that these schools are not covered by Title IX.) Under this religious exemption, Catholic colleges can legally discriminate against students who are pregnant or who terminate a pregnancy through abortion. They can even refuse to admit a student who has had an abortion and they can treat women already enrolled who have an abortion in ~~a~~ any way that is consistent with their religious beliefs. In contrast, schools without that exemption are not allowed to treat pregnant students or those who choose to have an abortion any differently than any other students with a medical condition. Similarly, a school controlled by a Fundamentalist religious organization which believed that the Bible prohibited men and women from bathing together would be exempt from any Title IX requirements about coeducational swimming instruction.

In order for a school to obtain the exemption, it merely writes the Assistant Secretary at the Department of Education that it is indeed controlled by a religious organization, and it identifies the policy or practice required by Title IX and the tenet of the religious organization with which it conflicts. No school which has requested an exemption and provided this information has ever been turned down. Indeed, the Office for Civil Rights has issued a memorandum to its field offices specifically instructing its personnel to accept at face value and without challenge or investigation of the assertion that a school is controlled by a religious organization. One can hardly call the requirement of writing a short letter a "federal intrusion" into the autonomy of an institution. It is certainly a good deal less than what the IRS requires of religious organizations when they request a 501(c)(3) status in order to be exempt from income tax. And no one has called that procedure "too much federal intrusion into religion." Moreover, it is difficult to see what currently existing "problems" make this amendment necessary. Certainly there has been no litigation on the subject in the more than 13 years that Title IX has been in effect.

The proposed change to Title IX is not a clarification of the Supreme Courts decision; it is a new and broad exemption which would greatly expand the number of schools who could claim exemption from Title IX. A school would no longer have to be a bona fide arm of a religious organization. It need only be "affiliated," no matter how loose that affiliation is. About 25% of the more than 3,000 institutions of higher education are "affiliated." (Fewer than one-third of these have sought to use the exemption.) Moreover, the term "affiliation" is not a technical term easily defined; it does not for example require that the school have the same purpose or agenda as the religious organization with which it is affiliated. "Affiliation" ranges from control by the religious organization to a loose arrangement which may be as minimal such as having one or two members of the Board of Trustees be from a particular religious group which had founded the school originally.

The House Education and Labor Committee bill claims to restrict the effects of changing the religious exemption to include religiously "affiliated" schools by requiring that the religious tenets which form the basis of the exemption be "an integral part" of the operation of the covered educational program. But the word "integral" is not defined; it is vague terminology and it would be up to federal officials to determine which religiously affiliated organizations were eligible for the exemption, and to determine just what the words "integral part" mean. The ~~This broad~~ authority granted to federal officials does is thus increased indeed pose a danger to those concerned about the freedom and independence of the country's religious groups. One could expect substantial amounts of litigation from both civil rights groups and from religious organizations. For example, a school seeking to continue a discriminatory policy might deliberately seek out a religious "affiliation," perhaps by merely setting up an internship program with a religious organization. Does that constitute "affiliation?" Who would decide?

Such a broad exemption for religious organizations is simply unprecedented in the history of civil rights legislation. The only such exemption, and a narrow one at that, appears in Section 702 of Title VII of the Civil Rights Act of 1964 as amended, whereby religious organizations, including schools, are allowed to "discriminate" in employment by giving preference to members of the same religion. (It does not, however, allow them to discriminate on the basis of race, color or national origin on the grounds that their religion requires it.) In contrast, if this amendment to the Civil Rights Restoration Act is allowed, it will permit schools with the most tenuous and vague religious "affiliations" to discriminate in admissions, in rules regarding marital and parental status of students and employees, and even in providing access to particular courses or extracurricular activities. For example, an institution could say that its religious tenets require married women not to work in order to make a religious home, or to say that it is not appropriate for women to participate in athletic activities. This amendment if approved would greatly reduce the protections that women students and employees have had under Title IX.

The second issue I want to talk about today is that of abortion, but only insofar as it has become an issue in the Civil Rights Restoration Act. This is not the time or place to discuss the merits or demerits of abortion. But it is the time and place to discuss how the particular proposed amendment to the Civil Rights Restoration Act would affect the educational opportunities of female students. Opponents of abortion have attempted to inject issues involving abortion into the Civil Rights Restoration Act. Again, I do not want to talk about the issue of abortion but only to point out what might be legal should this amendment succeed.

The proposed amendment would overturn longstanding Title IX regulations which prohibit covered institutions from discriminating on the basis of pregnancy-related conditions, including abortion. The regulations are not pro-abortion; they merely insure that pregnant students or those that choose to have abortions are not treated any differently than students with other medical conditions. There is a long history in education of denying educational opportunities to students and employees who become pregnant. They have been excluded from classes and from employment. While we like to think that this does not happen any more, ~~just~~ last year a young woman who became pregnant was refused membership in her high school's honor society. ~~Now~~ And just as out-of-wedlock pregnancy has been used as a litmus test for morality, a woman's choice to have an abortion -- a right which the Supreme Court has upheld -- has also been used as a judgement on her morality. Thus it is not beyond the realm of possibility that a school board or other school administrators could indeed decide to exclude or penalize students who have had abortions, should this amendment be included in the Civil Rights Restoration Act. Other possibilities are as follows:

- students could be expelled or suspended not only for having an abortion, but even for seeking information about abortion;
- abortion could become a litmus test for admissions: schools could require sworn statements from women students as a condition of admission that they have never had or will have an abortion. Men students could be required to swear that they will never assist any woman (student or otherwise) in obtaining an abortion;
- students who choose to have an abortion could be prohibited from living on campus; joining honor societies; participating in athletic programs; and even from taking certain classes. A student who had an abortion could even be prohibited from graduating;
- students could be denied medically-necessary leaves of absence;
- students in need of post-abortion counseling could be denied access to the Health Center or other institutional counseling services;
- a student who had been gang raped at a fraternity or who was a victim of incest could be told she would be expelled if she had an abortion.

- women who used their medical insurance for a D & C procedure — which could also be used as an abortion — might be required to swear or otherwise prove that they didn't have an abortion.
- Pregnant students and employees could be forced to have counseling against abortion.
- Insurance policies for students and employees could omit coverage for abortions and any complications that might arise.

Women will not be protected against any of these actions if this amendment to the Civil Rights Restoration Act is enacted.

¶ Title IX has been controversial, but contrary to myth, it has not caused hardship to the academic community. Despite dire predictions, no school has abolished its football team nor are schools "drowning" in paperwork.

Federal funds should not support discrimination in any form. One of the myths about Title IX is that the government forces institutions to take specific actions. No institution is forced to do anything to end discrimination unless it voluntarily accepts federal funds — it is, in a sense, a contract with the government, a contract to end discrimination that is a condition of receiving federal dollars. And even then, institutions subject to Title IX are not told what to do but merely to treat women fairly. They are not told to have an athletic program or not, but merely that if they have such a program, then indeed they must treat women fairly within that program.

The Association of American Colleges, with nearly 600 members, has a long standing commitment to ending discrimination against women and other groups and supports passage of the Civil Rights Restoration Act.

Just as Susan B. Anthony once said "Men, their rights, and nothing less. Women, their rights and nothing more," so it is with the Civil Rights Restoration Act — we want nothing less and nothing more; simply, we want those rights that were in place before the Grove City College decision.

¶ Few schools at any level ever see an investigator from the Department of Education's Office for civil rights. Less than 1% of the nation's schools and colleges are likely to see such an investigator. Most of the changes that have occurred have happened because institutions are willing to obey the law, and not because there is a federal investigator at their door. Having a law in place has made it possible for institutions to move forward and provide a greater equity for its students and employees. Weaken that legislation can only lead to backsliding the weakening of the will to change.

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SUPREME COURT GUTS TITLE IX WOMEN STUDENTS LOSE MAJOR PORTIONS OF PROTECTION AGAINST SEX DISCRIMINATION

The recent decision of the Supreme Court in *Grove City College v. Bell* (No. 82-792), February 28, 1984) seriously undermined the protection students have had against sex discrimination under Title IX of the Education Amendments of 1972. At the request of the Reagan Administration, the Court ruled that Title IX does not have the broad institutional coverage assumed by previous administrations. (Title IX prohibits sex discrimination in federally assisted education programs and activities.) The decision has been viewed by women's organizations throughout the country as a setback for women's rights in education. The Office for Civil Rights at the Department of Education which enforces Title IX has already dropped at least two cases involving athletics at the University of Maryland and Pennsylvania State University and is expected to drop others.

The Court held that when a college receives federal money only through its financial aid program, then only the financial aid program is covered by Title IX; the institution can discriminate elsewhere in its programs.

Although the decision leaves many questions of coverage unclear, programs which receive direct funding by the federal government are still covered by Title IX. However, only about four percent of the over 13 billion dollars going to colleges and universities is for earmarked programs, such as remedial aid for disadvantaged students, or vocational education programs. These programs affect a very small number of students; moreover these students would be protected against sex discrimination only during the time that they are in the program. In other words, most students will not be protected against sex discrimination for most of their college experience.

The coverage of Title IX will also vary from institution to institution, depending upon the particular kinds of federally funded activities. Moreover, institutions are likely to face an increased paperwork burden as women seek to trace the federal dollar, (as well as the federal government when it is investigating charges) and ask questions such as: which programs have federal funds? Whose salary is paid for with federal funds? Which buildings were paid for with federal funds? Which equipment and office furniture was paid for with the federal dollar? Not only will coverage differ at every institution, but to the extent that federally funded programs may differ from year to year, the coverage that students have in a particular institution will also vary from year to year.

Students will, in most instances, no longer be able to use the force of law to end discriminatory practices; they will be dependent on good will instead; i.e. they will only be able to say "That's not nice" rather than "That's illegal."

Legislation has been introduced in the House of Representatives and in the Senate (HR5490 and S2568) to overturn the Supreme Court's decision. Because the decision may also affect other civil rights laws with language similar to that of Title IX, the bill amends not only Title IX but Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. Organizations dealing with discrimination based on sex, race, ethnic origin, handicap and age are urging people to contact their Representatives and Senators.

The analysis below was prepared for and distributed by the National Coalition for Women and Girls in Education, Washington, DC.

QUESTIONS AND ANSWERS ABOUT *GROVE CITY COLLEGE V. BELL*

On February 28, 1984, the Supreme Court decided the case of *Grove City College v. Bell*. The Court held that a college which receives federal money only in the form of student financial aid channelled through its students is a recipient of federal financial assistance under the terms of Title IX, even though these funds are not given directly by the federal government to the school. The Court also decided that under these circumstances, the only part of the college which is covered by Title IX is the student financial aid program. The rest of the institution is free to discriminate on the basis of sex.

Many people are asking what this means for women and girls who work and study around the country in elementary, secondary, and vocational schools, and in colleges and universities, both public and private. Here are the answers to some major questions.

What is Title IX?

Title IX of the Education Amendments of 1972 is the only federal law against sex discrimination in education. It covers both students and employees in all federally-assisted education programs and activities. It bars discriminatory policies in academic and extra curricular activities, counseling, physical education, student housing, athletics, faculty, staff and student employment, and any other activity carried on or benefit provided by educational institutions. Since its passage twelve years ago, Title IX has been the catalyst for dramatic gains in the educational opportunities of women and girls. Before Title IX, it was both legal and common for female students to be excluded from admission to professional schools, be denied access to vocational education opportunities, encounter gross disparities of opportunity in men's and women's intercollegiate athletics, and suffer many other educational inequities. Enforcement of Title IX has made a start toward changing the status of female students and employees in schools and colleges across the nation.

Does the Grove City decision of the Supreme Court narrow Title IX?

Yes, substantially. The ruling holds that student financial aid money, which had been considered general aid to the entire college since it is used to pay tuition, will be considered aid only to the financial aid office. Even if 90 percent of the students at a college or university finance their education with federal grants, as long as no other federal assistance goes to the school, the institution can discriminate in all activities and functions other than student financial aid.

Did the Grove City decision mean that the whole financial aid program is covered, or only the BEOG program?

The Court stated clearly that the whole student financial aid program is covered when students at a college receive federal Basic Educational Opportunity Grants (BEOGs, also called Pell grants). Some had argued that the government could regulate only the administration of the BEOG program, but the Court was careful to note that this is too narrow a reading of the statute. The Court said, "Students who participate in the College's federally assisted financial aid program but who do not themselves receive federal funds [are] protected against discrimination on the basis of sex." (Footnote 21, Slip. Op. p. 15.) This segment of the decision also suggests that the very narrow ruling of the Sixth Circuit U.S. Court of Appeals in *Hillsdale College* v. *Department of HEW*, 696 F. 2d 418 (6th Cir. 1982) will be overruled insofar as it determined that only the federal portion of the financial aid program at Hillsdale College was obligated not to discriminate. Hillsdale College has asked the Supreme Court to review the U.S. Court of Appeals decision, but no action had been taken by the Court at the time this document was prepared.

Is the federal funding of Grove City College typical in higher education?

Yes, insofar as almost all post-secondary schools receive some form of federal student financial aid. The limited nature of federal funding at Grove City College is common at some small colleges, including many community colleges. Like Grove City College, these schools receive federal funding only in the form of various student financial aid programs, including BEOGs. In contrast, most larger colleges and universities and some two-year schools receive various types of federal funds in addition to student financial aid, such as grants for research and for special instructional programs and funding for building construction on campus. This funding comes from such federal agencies as the National Endowments for the Humanities and the Arts, the U.S. Departments of Defense, Energy, Treasury, Transportation, and the like. At these institutions, the multiple forms of federal financial assistance mean that more aspects of the school are covered by Title IX than just the financial aid program—even under the very narrow reading of Title IX advanced in the *Grove City* decision.

Furthermore, while the Supreme Court held that student financial aid is not "general aid" that brings the whole institution under Title IX, it did not eliminate the possibility that other types of federal assistance will be viewed as general aid and thus will result in institution-wide coverage. For example, the Title III programs, which provide federal funds to developing post-secondary schools, are general institutional aid and should result in institution-wide coverage.

Does the Grove City decision apply to elementary and secondary schools?

Yes. The Court decided that federal financial assistance given for a restricted purpose only creates Title IX coverage in the narrow program which receives the assistance. This principle will apply to all levels of education.

However, the decision could have less impact on elementary and secondary schools than on post-secondary education. Narrowly earmarked federal assistance (which would be analogous to a specific research grant to a university, for example) is less common on the elementary and secondary level. Much of the federal money for elementary and secondary schools takes the form of block grants which can be used for any of several purposes. The *Grove City* opinion described student financial aid in higher education as *sui generis*, or one of a kind, leaving open the possibility that other types of aid will be viewed as bringing the whole school district and entire schools under the coverage of Title IX. In elementary and secondary schools, federal Impact Aid is general in nature and provides justification for application of Title IX to all aspects of the district's educational efforts. Similarly, federal support for vocational education conducted by a school district should provide coverage not only for all activities in vocational institutions but also for all vocational education within the district conducted outside of the vocational institutions. What precisely is covered will become clearer as the lower courts apply the Supreme Court decision in *Grove City* to the factual situations posed in cases that are now, or will be, in the courts.

What happens to protection from sex discrimination in athletics after the Grove City decision?

In some cases, as in the Grove City situation, athletics is no longer covered. But there are many institutions at which protection could continue. In any school receiving general federal aid, the entire athletics program will be covered. In other types of schools, Title IX coverage may exist in a more spotty fashion. The application of this decision ensures that almost all schools will be covered by Title IX with respect to the athletic scholarships. Under the *Grove City College* decision, if a school gets federal funds for student financial aid, its entire financial aid program is covered by Title IX. Most colleges and universities receive federally-funded student financial aid in the form of Pell grants, Guaranteed Student Loans, college work-study, and other student financial aid programs. Therefore, such schools would be prohibited from discriminating in the distribution and award of athletic scholarships, which are enormously important for achieving sex equity for college athletes, and which benefit the whole athletic program.

Also, the *Grove City* decision does not address the coverage of Title IX when buildings have been constructed on campus with the aid of federal dollars. The government's consistent position has been that any activities conducted in a building constructed with federal assistance are covered by the civil rights provisions. Thus, if athletes are housed in dormitories built with federal funds, as many dormitories are, housing arrangements for the athletes would be covered by Title IX. Similarly, if a school builds a facility for physical education instruction which includes a gymnasium in which intercollegiate athletic events take place or practice is held for varsity teams, those activities would be covered. These federal funds benefit the athletic program as a whole.

In specific cases, athletic programs benefit from federal funds in other ways as well—such as by using federally funded remedial or tutorial programs within the university, or feeding athletes at training tables in cafeterias that are federally funded. Thus under certain factual situations, the whole athletic program—and not just the athletic scholarships or the athletic activities in a given building—might be brought under the coverage of Title IX.

Will female students who have been sexually harassed still have a legal remedy after Grove City?

Sexual harassment is recognized as a violation of Title IX, but because the Court has found Title IX's coverage to vary depending on the specific pattern of federal funding, whether a woman student has a legal remedy for being sexually harassed may depend quite literally on the building in which the harassment took place, and on which member of the faculty or staff is accused of harassing. At Grove City College, a woman student could take the school to federal court on a question of sexual harassment only if she were victimized either by a member of the financial aid staff or within the financial aid office.

Grove City involved the possible cut-off of federal funds to the college. What are the implications for private lawsuits based on Title IX?

There are three remedies for violations of Title IX. First, the particular federal agency providing funds to the school may make a determination that the institution is practicing discrimination and cut off federal money—but only after attempting to get voluntary compliance and then conducting a full administrative hearing. Second, the agency may go to court and ask for an order ending discrimination while leaving the federal funding in place. The third possibility is that the person who has been discriminated against may seek relief by bringing a private lawsuit against the offending institution.

Though the *Grove City* case involved an agency's attempt to cut off federal funds (the cut-off was postponed while the case was pending), the case has destructive consequences for any legal action under Title IX, including private lawsuits by individuals. Before the agencies or individuals can even begin to prove the actual charges of sex discrimination, they must make a costly, time-consuming, and possibly fruitless search for a connection between the federal funding and the particular department or aspect of the school in which discrimination was encountered. Obtaining legal redress under Title IX has thus become far more burdensome to everyone involved.

How often have federal agencies terminated federal funding for a violation of Title IX?

Never. Although Title IX was enacted twelve years ago, not a single school, college or university has lost federal funding due to violations of Title IX. In virtually all cases, if a violation is found during the investigation, the conciliation process that follows resolves the issue with a corrective action plan designed to eliminate the discriminatory practice. The recipient institution or district is then deemed to be in compliance as long as it carries out the terms of the corrective plan.

Is Title IX still needed?

Yes. With the help of Title IX, female students and employees have made substantial progress in gaining equality of treatment in schools and colleges. But there is still much to be accomplished. Girls are often channelled into vocational education programs that train for a few low-paying, traditionally female occupations. Educational institutions still discriminate in their hiring, pay, and promotion of women. While women are numerous in the teaching profession, they are still rare in higher administrative posts, including the job of high school principal and school superintendent, and in tenured faculty positions. Sexual harassment of students and staff at all levels of education is a significant problem whose dimensions are just now becoming apparent. In athletics, the resources devoted to women and girls, and the opportunities for their participation in athletics are still substantially less than those provided for men and boys. Female students frequently find themselves squeezed out of programs offering contact with computers. These are just a few of the hurdles that remain before sex equity in education becomes a reality.

Can't other laws fill in the gaps in Title IX created by the Grove City decision?

No. Title IX is alone in its potential to offer comprehensive protection from sex discrimination in federally-assisted educational institutions. Other laws do not provide a complete substitute. Title VII of the Civil Rights Act of 1964 protects employees, but not students. The Fourteenth Amendment of the U.S. Constitution does not provide for enforcement by federal administrative agencies, nor does it protect persons in private schools or colleges. In addition, since there is no Equal Rights Amendment in the Constitution, the Fourteenth Amendment is not as strong as a statute such as Title IX. And state Equal Rights Amendments and state Title IXs are not available in all states.

Could passage of the federal Equal Rights Amendment do away with the need for Title IX?

Not entirely. The Equal Rights Amendment will only affect public educational institutions. (A public institution is created by a public body and is financed by taxpayers, including state or local taxpayers; it does not necessarily receive more or less federal funds than a private institution.) Title IX applies to all schools and colleges receiving any federal financial assistance.

What are the implications of the Grove City decision for other federal laws against discrimination?

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in programs receiving federal assistance. Section 504 of the Rehabilitation Act of 1973 as amended in 1978 prohibits discrimination on the basis of disability in federally funded programs. The Age Discrimination Act of 1975 has a parallel prohibition against age discrimination. All three laws have language similar to that in Title IX which was interpreted by the Supreme Court in *Grove City*. The operational language of Title IX was expressly patterned on that of Title VI (though coverage was limited to education), and was in turn tracked by Section 504 and the Age Discrimination Act.

Prior to enactment of Title IX, court cases had already given a broad interpretation to the "program or activity" language of Title VI. The Congress was aware of this interpretation, and incorporated it into the language of Title IX and §504. However, despite preexisting court precedent giving broad coverage to Title VI and §504, the Supreme Courts' *Grove City* decision will probably result in interpretations of these three statutes that are just as restrictive as that given to Title IX. The Department of Justice has stated that it will apply the Supreme Court's narrow interpretation of "program or activity" to other civil rights statutes. Therefore, after the decision, the protection from discrimination available to the elderly, minorities and the disabled in all kinds of federally assisted activities is likely to be as spotty and inadequate as that offered to women and girls in education.

Have there been fund terminations for noncompliance with Title VI, §504 or the Age Discrimination Act?

Only in very rare instances. For example, between 1972 and

1984, fund termination for Title VI violations in elementary, secondary and higher education institutions has occurred only once. Termination was ordered only once under Section 504, when a major teaching hospital refused to let the government conduct an investigation of a Section 504 complaint lodged with the Department of Health and Human Services. That termination order has been stayed pending judicial review, which has been ongoing for over a year. There have been no fund terminations under the Age Discrimination Act.

Does a recipient of federal funds have any protection from arbitrary and unjustified fund termination for alleged violations of Title IX, Title VI, §504 and the Age Discrimination Act?

Yes, the recipients (e.g., school districts, colleges, hospitals, county governments) are well protected from arbitrary and impulsive fund termination under all four statutes.

The statutory language of Title IX requires the government to attempt to conciliate all violations. If that fails, the recipient is entitled to a full hearing before an administrative law judge, as was afforded Grove City College in 1978. The decision of the agency can then be challenged in the federal courts, also by the specific terms of Title IX (20 U.S.C. §1683). Further, the statute requires that the federal agency performing the fund termination give thirty-day notice to Congress before the funding is cut. Finally, the bar to funding is not permanent. Once the recipient takes the necessary corrective action and ceases the discriminatory practices, the federal funding can be restored.

The same or greater protections are afforded recipients by Title VI (42 U.S.C. §2000d-1), Section 504 (29 U.S.C. §794a), and the Age Discrimination Act (42 U.S.C. §6104(a) and (b)).

It is also important to keep in mind that the government need not use the fund termination remedy in all instances. It may refer the case to the Justice Department which can then ask the federal courts for an order requiring the recipient to end its discriminatory practices, leaving the federal funding in place.

What kind of legislative action can best remedy the effects of the Grove City case?

Prompt legislative action is necessary to amend Title IX, Title VI, Section 504, and the Age Discrimination Act to clarify Congress' intent that all of these laws have broad coverage. A bill to modify all four laws has been endorsed by a broad coalition of civil rights groups representing women, minorities, the disabled, and the elderly. Until such legislation is enacted, enforcement of these laws will be curtailed. Any protections will be jeopardized by the need to identify and trace specific sources of federal funding before steps can be taken to halt discrimination. A clear message from Congress is needed to prevent recipients of federal funds from assuming, in the wake of *Grove City*, that they may be free to engage in discriminatory practices. The legislation is also crucial to assuring that federal funding is not used to sponsor, assist or support discrimination.

What happens to Title IX complaints that are pending at the Department of Education?

It will depend on the federal funding at each school and the type of complaint. The Administration, which has never been enthusiastic about Title IX enforcement, may use this decision as an excuse to rapidly close many open sex discrimination complaints. Closure without a full explanation of the type of federal funding at the school and the specific terms of the complaint is inappropriate and unjustified.

What happens to Title IX cases that were pending in the courts when the Grove City College decision was issued?

All judges must follow decisions of the U.S. Supreme Court and will therefore be obligated to apply the lesson of the *Grove City* decision to Title IX and may well apply it in civil rights claims brought under similar statutes. Each court will evaluate requests by parties in the case for actions to restrict the boundaries of the case if any such restriction would be suggested by the application of the *Grove City* decision to the facts before the Court. Some cases will be hurt by the decision, while others will remain unaffected.

The **Chairman**. Thank you. Miss Shavlik, let's turn to you at this time.

Ms. **Shavlik**. I would like to also correct the record. This is the most interesting spelling of my name I have seen to date.

The **Chairman**. I was a little worried about that myself. How is it spelled? Have we really misspelled it that badly?

Ms. **Shavlik**. Senator Hatch, I am pleased to be here and my name is Donna Shavlik. It is Shavlik.

The **Chairman**. We apologize.

Ms. **Shavlik**. And I am going to add this to my list. I am director of the Office of Women in Higher Education at the American Council on Education, and I am very happy to be here with you today.

I am fresh from a meeting of 26 colleges and universities, of the vice presidents of student affairs from those institutions, and I want to share with you some of their feelings, some fresh examples of what can, and has already begun to happen as a result of the Grove City legislation and the concomitant problems that have arisen as a result of the civil rights office interpretation of those.

I would like to say before I start, that the American Council on Education has submitted a letter to you, recently, on the 18th, and I would just like to quote a sentence out of the third paragraph on that because I think it reflects these 26 colleges, 12 of whom are private institutions, 12 of whom are colleges, and universities, and 1 community college.

And that is very reflective of our membership, although we have more community colleges represented than that. This letter, for the record, was signed on by a number of other educational associations at One Dupont Circle.

It is our position that enactment of this legislation is warranted at this time, to ensure that educational rights are protected to the fullest extent, and to signify a redirection to the goals of existing civil rights statutes.

It should be made clear that any such legislation is neither intended to affect existing exemptions for religiously affiliated, or single sex institutions as contained in the four statutes.

Nor is it intended to affect the tax-exempt status of any institution of higher education and I think Dr. Sandler has clarified that as well.

I will not make my testimony very long because I think it does not take very long to tell how important it is that we pass the legislation soon.

I want to just address a few of the kinds of discrimination that are continuing, and to expand on what Dr. Sandler has appended to her testimony. Recently, both professors of chemistry and deans of engineering at some of the institutions that I had just mentioned earlier were allowed to discourage, or reject women students on their face, because they were not feeling that these students would be good students for chemistry and for engineering, thereby denying them employment in the future.

That could occur because it is not allowed to have, those two, the chemistry department and the engineering department at that particular institution were not receiving Federal financial assistance.

While great gains have been made for minority individuals at many institutions in the past, we are now, since 1980, starting to see a real decline in the numbers of minority students attending institutions of higher education and there is a great worry about that among the institutions of higher education; whereas, there are 11.7 percent minorities in the population and we have only 2.6 percent of blacks in higher—11.7 of blacks in higher—in the population, we only have 2.6 percent in higher education.

And we strongly believe that although higher education is committed to make changes in this arena, we need the basis of the law to back us up.

In 1984, the United States held and hosted the Olympic games, and it was for us the best Olympic games we have ever had. As a public member of the Olympic Committee for the last 8 years, I have become strongly aware of how important title IX, and even title VI and 504, because we have now added sports for the handicapped to the Olympics—how important those laws were in terms of recognition and more importantly, in terms of equitable finances, so that development of the sports could take place at elementary and secondary schools, as well as higher education.

I think it is well documented that some of the recent cases, and I will go to those in 1 minute, that were dismissed as a result of Grove City, had to do with athletics.

It would be very easy for slippage to take place, very quickly, and just to cite one example that was once again given to me by the people who are right here in town, now.

Travel to the finals of playoffs, where a women's team was denied because an institution decided it did not have money. It had two teams that had reached the finals in two different sports, one men's and one women's, and they chose to send the men's team and not the women's team.

So that team did not get a chance to participate, and no one said anything, and no one's been able to do anything because of the problems that exist currently, without the backup of the law. I would like to mention another issue which is dealt with in Dr. Sandler's paper appended. That is the issue of sexual harassment.

Despite the fact that we would wish that would not be true, all studies, and a most recent one, show that there is considerable harassment on our colleges and university campuses.

A recent study by two Ohio State University professors demonstrated that 20 to 30 percent of 310 students at, female students at 310 institutions, reported incidents of sexual harrassment.

A question might be, is that—are not some of those false reports? Well, they also asked that question and only a very small percentage were considered to be false reports. Eighty-two had been documented and were still being dealt with on those campuses.

An additional statement that I would like to make has to do with the fact that although higher education is very committed, I think—and I have seen a change over that and I think Dr. Sandler has, too, as we have worked together over the last 10 years in this arena—there are still some who do not believe that students need to be protected from prejudicial judgments that affect their life and society.

And I think here is the place to point out that 90 cases of discrimination reported by students and faculty, and others, have been set aside as a result of the Grove City legislation, some on a jurisdictional basis, but they affected all the laws, including title VI, title IX, 504, and age discrimination.

Delays mean new generations of students will be denied some of their rights, and I am particularly concerned about this as regards women students, since I head the Office of Women in Higher Education. Sometimes I wish it were just women students, I would like to concentrate on that, but it is for everybody.

Over half of our college population now, 52 percent are women students, and we are just this year going to hit over half of the master's degrees given to women students.

And one might say that that is wonderful, and it is wonderful, but we have to remember that they still can be discriminated against in their choices of majors, and so forth, and we must protect those rights.

Not only do those women suffer but society suffers if we do not. Just a quick point on employment discrimination.

Without the protection of these laws that are contained in the bill that we are discussing, people would have to sue under title VII and those remedies may be available to them, but we think they should not have to go to court under those circumstances to have those corrections taken care of, and it is a very important aspect.

I would also like to mention, just briefly, the student assistance situation. We do believe that student aid does constitute student assistance. Every aspect of student aid does, and I think it does not flow that it would be—it is very difficult if you are an administrator, and I have been a student personnel administrator myself, to try to imagine how one would not see that that aid constitutes indirect aid to the institution, and how one deals with those questions.

I also think I would like to add something here I had not planned to say but since the tax-exempt question came up, I would like to point out that this bill does not cause tax-exempt status to be triggered by the civil rights laws.

The regulatory description of what constitutes Federal financial assistance does not include tax exemptions, neither H.R. 700 nor S. 431, does not alter this in any way.

Tax-exempt entities have certain obligations, but this law does not alter them nor add new ones.

Finally, I would like to point out that these are the years following a growing awareness, not only of the rights of individuals, regardless of race, sex, disability or age, but we need to recognize that the best of talent cannot be employed if we fail to have these laws to safeguard and to protect us against those who have not followed along in the last several years of these principles.

It is not only to our best interest as a nation, but it is every person's right to achieve his or her best potential. I urge us to get on with it. Thank you very much.

The **Chairman**. Thank you, Miss Shavlik. Mr. Gaffney, we will now receive your testimony.

Before that, however, I think that it is pertinent to note that all of the abuses that you, Dr. Sandler and Ms. Shavlik are concerned about would be corrected by the Dole-Hatch bill, which I support. But I would like to amend S. 272 with my two proposed amendments. I think they would provide necessary constitutional protection for religious institutions as well and solve some of their concerns they have mentioned today. But I add that, one way or the other, we are all dedicated to try and make sure that title IX applies at least as strongly as it did before the *Grove City* case and, I hope, even more strongly after the legislation we pass in order to recognize its value to women and to the role they can play in our society.

Thus, we will keep working toward that end. I know that sometimes people try to distort the questions that I have raised. They try to distort those questions by saying that I am not as interested as you are in having title IX applied. That is untrue.

Let's go to Dr. Gaffney. Thank you for waiting.

Dr. **GAFFNEY**. Thank you, Senator Hatch. I am appearing before the committee this morning, not in any official capacity representing any organization or institution, but as a student of the law, and more particularly of higher educational law, who has conducted an extensive empirical study and legal analysis of Federal regulation as it extends to religiously affiliated colleges and univerities, and the fruits of that research were published in the volume to which you graciously made reference, Senator.

I am submitting a copy of that volume along with my testimony this morning, so that the committee and its staff may feel free to incorporate into the record any portion of that that they may find relevant to your task.

Now along with a copy of an address entitled, "The Constitution and the Campus," that I delivered in 1979 to the National Congress of Church-Related Colleges and Universities.

Last year, in considering the proposed legislation, S. 2568, the Subcommittee on the Constitution of the Senate Judiciary Committee, which you chair, Senator, elicited a broad spectrum of use concerning a variety of themes.

I might sum them up under three headings. First, inquiry as to the original intent of the Congress with respect to program specificity, and second, the manner in which that provision and similar provisions in other civil rights statutes has been construed by Federal administrators, and then third, the process of interpretation of title IX by the Supreme Court in the *Grove City* case.

And rather than go into those matters that I think have already adequately been discussed in the past, I would focus my comments on the bills before the current Congress, and more specifically on the two proposals that you have called to the attention of your colleagues, that is to say, the differentiation between institutional assistance of a direct sort, and assistance to students, and on the other hand: the need for thoughtful revision of the exemption for religious institutions.

I would submit, without detailing in this testimony, that if the act—I am sorry—if the legislation, as proposed, is enacted by the Congress without any of the amendments such as those that you have proposed, we might better entitle the act, the full employment of higher education attorney's act of 1985, precisely because of the vageries in some of the language that is contained there.

It invites the administrative branch to take over the definitional process. To be sure, people will be disgruntled at what the bureaucrats do, and therefore invites the judiciary to take over the role that presumably the electorate had assumed was the function of the Congress in the first instance, and that is not meant to be a derogation of the legitimacy of the delegation of power. We have not had a serious challenge to that sort of congressional delegation since the "hot oil" case in the mid-1930's.

It is simply a question of prudence and wisdom. It strikes me that that is the primary task of the elected representatives.

Now I would like to make a very brief comments about Grove City itself. You have already heard the testimony of President MacKenzie and I do not want to make a long statement about that institution.

But as part of my testimony I wish to enter into the record the fact that that particular college was one of the first American colleges to open its doors to women in the 19th century.

It has never maintained a policy of discrimination on the basis of sex. As for conscientious reasons, however, it preferred to remain unentangled in any form of Federal regulation arising under the spending power, by declining all forms of Federal financial assistance to the institution, and nonetheless, was dragged into the litigation culminating in the Supreme Court's decision last year, because of the institution's refusal to sign the assurance of compliance, regarded by the school as a capitulation to the regulatory jurisdiction of the Government, that it had diligently, and at great cost, sought to avoid. To go to your first amendment, Senator Hatch, the distinction between student aid and institutional assistance.

I observe in my testimony that the Reagan administration did not withdraw from the litigation after taking the reins of the executive branch in 1981.

That litigation of course had commenced during the Carter administration, and we heard testimony last year of Secretary of Education Bell, to the effect that he wanted to respect the independence of Grove City and wanted to be their friend and ally, at one point in the testimony, and that he could find no instance of discrimination on the campus of Grove City.

Nonetheless, it was his view that the alternate dispersal Pell Grants that Grove City was engaged in was not a form of Federal financial assistance, but that his view did not prevail in the Reagan administration and in the debate within the administration over how to handle the case. A dispassionate reading of the law by the attorneys in the Justice Department yielded the conclusion which the Deputy Solicitor General argued to the Supreme Court, and which the Court adopted unanimously in part 2 of its opinion.

Namely, that student aid and institutional assistance are really indistinguishable for purposes of answering the question, what is Federal financial assistance? I would suggest that there are good policy arguments that might be made to justify precisely that view, and you have heard them articulated this morning by my friend and colleague, Dr. Sandler, especially where the stakes are so high, in an area so vital to the survival of the current quality of the Republic that we desire, namely, where the issue is the protection of civil rights.

It seems to me, though, that before undertaking that sort of path, of saying, well, the Supreme Court got it right in part 2 of the decision but got it wrong in part 3 of the decision, that it would be well for the Senate and the House to pause, and perhaps to reflect that maybe the Supreme Court got it wrong in both parts, and that basically is the thrust of my testimony.

I would submit that a review of the purpose of the many educational provisions found in title XX of the United States Code, including the GI bill, Pell grants, and guaranteed student loans, was not to extend Government control over educational institutions.

To the contrary you find express statutory terms suggesting that the Government did not want to do that. Rather, it was to encourage greater freedom of educational choice by students and their parents. To be sure, by female and male students: by black, oriental, Hispanic, as well as white students. There was no intent to discriminate either on the basis of sex or race, but rather, to promote educational freedom of choice.

This purpose was premised on the recognition that colleges and universities that enrolled the vast population of our students, are those that are operated by the governments of the several States, which were heavily subsidized in the 19th century through the Federal Land Grant Program, under the Moral Act, and subsequent legislation, and which survive today because, as you heard in the first panel, much of their budget is supported by the treasury of State governments.

In short, the provisions in modern Federal aid statutes took into account the realities of the tuition gap between public and independent colleges, and expressly sought to foster diversity in educational approaches by encouraging meaningful choices between these institutions.

The effect of part 2 of the *Grove City* case, however, among those few institutions like Grove City College itself, or Hillsdale, or some few others, and I would imagine the amount to approximately 3 percent of the, if that, of the total American institutions of higher education, that refused direct institutional assistance, was simply to harden their resistance to what they regard as governmental overreaching. Now it is not transparently clear to me, that this result, or effect, is consistent with the clearly announced purpose of the Congress in enacting the Federal aid laws.

This misfit between purpose and effect would be tolerable, and in my judgment, even necessary, where an institution which a student qualifying for Federal aid sought to attend, is engaged in an intentional policy or practice of discrimination on the basis of race, color, national origin, sex, handicap, or age, the categories in the subject legislation.

Where, however, as in *Grove City*, the undisputed fact is that the college does not discriminate, the vital governmental interests of protecting the equality of persons irrespective of their race, color, national origin, sex, handicap or age, does not suffer by express language exempting from the definition of a recipient, of Federal financial assistance, those few institutions which, on conscientious grounds, decline any form of direct institutional assistance.

In my testimony I outlined the difficulties of reconciling the thrust of the Court's opinion in part 2 of *Grove City* with a whole host of Supreme Court decisions decided under the establishment clause beginning with the *Everson* case in 1947, and then *Allen* in 1968, and *Lemon, Nyquist* in 1971, 1973, and *Wolman* v. *Walter* in 1977, *Meek* v. *Pittenger* in 1975, and culminating in 1983 in *Mueller* v. *Allen.*

In all of these cases, the thrust of the Court's rationale for deciding the issue of whether or not assistance to a church-related school was permissible, is the form in which the agency, whether the Federal Congress or the State legislature had cast the aid.

If the aid flowed directly to the institution it invariably was invalidated. If, on the other hand, the aid was given to students or to their parents, it was thought permissible under the Establishment Clause.

Third, I want to raise a concern of fairness, that suggests that the Court may indeed have been attempting to strike a fair balance between the competing parties in the *Grove City* case, and it thought perhaps, in effect, that it was throwing a bone to each side, that it would give to Grove City something that they could live with in part 3 and they would give the Government something that they could live with in part 2.

Perhaps no such intentionality could be discerned from the minutes of the conference of the Justices of the Supreme Court, but my guess is that they were trying to construct some kind of an equitable balance between the parties.

In my judgment, however, the compromise that the Court struck pleased nobody. It pleased neither the administrators of the Grove City College who were outraged by the implications of part 2 of the Court's opinion, and it certainly has incensed the civil rights community by virtue of part 3, that curbs the remedial power of the Federal Government in providing effective institutionwide coverage of civil rights statutes.

So, in effect, I would suggest that this is the time for the Congress to tell the Court that it got the message of the Congress 100 percent wrong, not half wrong.

Effective civil rights enforcement would be achieved by clarifying the intent of Congress to regulate on an institutionwide basis any institution receiving institution assistance.

I will not debate about whether or not this restores the status quo ante or do we go into some yet new unknown future.

I think the point is we are here, we are now, this is the moment in history that we are given, and we are given the opportunity to do so reflectively, and I want to thank you, Senator Hatch, for insisting last year. Normally I do not like the filibuster process but I want to thank you publicly for asking your colleagues to take pause, and to do this process deliberately and thoughtfully.

I think we can achieve the goals that you have addressed to your colleagues in the committee today without entrenching on anyone's civil rights, including those of oppressed females who are victims of male dominance in our society.

I think that the Congress appropriately ought to exprses empathy for the victims of injustice in our society, whether the victims of apartheid or the victims of sex discrimination or any other form of invidious discrimination.

That last part of my testimony, however, suggests that we ought also to be compassionate and empathetic for the perspective of religious minorities, and here we are talking once again not about mainstream dominant perspectives.

Many Americans, perhaps the vast majority, I do not know the numbers and it does not matter to me what the numbers are, would support the notion that under some circumstances, a woman is perfectly entitled, both legally and morally to terminate a pregnancy.

It is not the conviction of many religious communities, however, and for us, for a moment, to argue from the abortion cases to the conclusion that the Federal Government ought to have regulatory authority to silence the voice of religious dissent on that issue, would, of course, be preposterous.

Presumably all of the material to which my colleague, Dr. Sandler, made reference on page 6 of her testimony, would be precisely the sort of thing that she, among others, would consider to be appropriate as part of the freedom of expression and the freedom of speech guaranteed to educational institutions that are covered by the religious exemption.

The argument of the quarrel then seems to be not whether or not freedom of speech is appropriate in our society. Surely that is not the issue.

Rather, it is the language that the Congress crafted in 1972, and whether or not once again, that hands over to the administrators and the executive branch greater power to define the content of the intent of Congress than is appropriate.

Another representative before you in hearings held last July suggested that there has not been a history—and you heard the same thrust of the testimony of Dr. Sandler this morning, that there has not been a—well, let me quote the language in the testimony last July that was presented by the Women's Equity Action League.

They suggested that the religious tenet exemption to title IX has not been a serious point of contention at any stage of the legislative, regulatory, or enforcement process.

As I mentioned at the outset of my testimony, my colleague at Notre Dame is Mr. Phillip Moots, and myself, conducted an extensive empirical study of the administrators of church-related institutions, and in chapter 9 of our volume, "Government and Campus," we report strong evidence to the contrary of the assertions that were made in testimony here.

And I say that once again with some reluctance because I obviously share the strong hope of the Women's Equity Action League, that effective civil rights enforcement will be restored after *Grove City*. I accept the word restored, but I cannot share their fear, that more careful wording of the exemption would, quote, "create a more lenient standard in order to have an alternative avenue for avoiding compliance with title IX", and there I take it is where I would also quarrel with Dr. Sandler.

Even a cursory reading of the materials that we collected and reported in chapter 9 discloses that there have been abrasive confrontations between administrators of religiously affiliated institutions of higher education on the one hand, and governmental officials on the other, typically, at a relatively low level of the bureaucracy, that does not get reported in the Washington Post or into the Congressional Record, or even get reported to the officials at One Dupont Circle.

We set forth several instances of such conflicts, including those emanating from Department of Education regulations mandating neutrality on abortion in the policy to schools receiving Federal financial assistance.

Without repeating that material here, I would suggest that a careful reading of the original abortion cases themselves would have us be more careful about this matter.

In *Doe* v. *Bolton,* the Georgia case decided as a companion decision to the Supreme Court's initial case, *Roe* v. *Wade,* the only part of that case in which the Supreme Court was unanimous, and clearly of one mind, was that the conscience clause of the Georgia statute had to be sustained. The Court otherwise, of course, invalidated the Georgia statute, indeed, invalidated the statutes on that issue of all 50 jurisdictions.

I would suggest that the testimony of Mr. Ball before you last July offers more helpful language than that adopted in the House. Indeed, if I may be so bold, more helpful language than that submitted by the Chair of this committee.

First, the language that Senator Hatch has proposed to incorporate into title IX is borrowed from title VII of the Civil Rights Act of 1964, and in my judgment, suffers from the same defect of the current language, namely, the exposure of religious educational institutions to the risk that unsympathetic administrators in the executive branch as well as unsympathetic members of the judiciary, will rule that that language of the exemption does not extend to this particular religious body. And I have cited in notes, several cases where judges have ruled, in an extraordinary way, about the very provision that Senator Hatch would bring now into section 901(a)(3) of title IX.

Second, in my judgment, newly crafted language would not ooen the floodgates of illegal discrimination on the basis of race, color, national origin, sex, handicap, and age.

To the contrary, it would but serve the lofty goal of underlining again, that the protection of religious liberty is vital in our plralistic society, so vital indeed, that the rights of religious bodies, according to the constitutional standard, ought to be free of governmental regulation, and may be overriden only where their exercise poses a specific and immediate threat, not avoidable by less restrictive alternatives to a truly compelling governmental interest

In my judgment, the elimination of the last vestige of racism, or sexism, of discrimination on the basis of handicap and age, constitutes such a compelling governmental interest.

On the other hand, it seems to me equally clear, that we have before us at the present moment an opportunity to use less restrictive alternatives.

I have referred in my testimony with approval to decisions of the Supreme Court , such as the *Sherbert* case, that suggests that the appropriate image for constructing sound constitutional policy, in cases involving questions like those before this Committee, is a scale, and that the task is to strike an appropriate balance.

The image of a scale can be helpful if it serves to emphasize the delicacy of the freedoms and rights at issue here, religious freedom and nondiscrimination on the basis to which I have referred.

It might also be helpful to think of a scale, if it serves to help public policymakers to understand the tragic ease with which any one of these rights or freedoms may be overborne by countervailing pressures.

But I submit that it is not a helpful image, if it induces public policymakers, such as the members of this committee, and the other Members of the Congress, to pit these rights and freedoms in conflict with one another, and then to attempt to quantify them and to tell us, in the public, which weights more, in your eyes.

Such an attempt, in my view, is doomed to failure because all of these rights are precious and must be safeguarded to the very best of our ability, and in any event, you who, as Senators, have taken the same oath taken by the President, the Cabinet officers and Federal judges, to uphold and defend the Constitution, are not put by that oath to the false choice of preferring religious freedom over apartheid or vicious sexism, for religious groups in this country, with the rarest of exceptions, are unequivocally opposed to these moral evils.

Your task, then, must be to enact legislation that preserves all the freedoms, and all the rights of all of us. Thank you.

[The prepared statement of Mr. Gaffney follows:]

Prepared Statement of Edward McGlynn Gaffney, Jr.
Professor of Law, Loyola Law School, Los Angeles

Mr. Chairman and Members of the Committee, thank you for your invitation to offer testimony on S. 272 and S. 431, proposed legislation to respond to the decision of the United States Supreme Court in Grove City College v. Bell, 104 S.Ct. 1211 (1984).

I appear before you this morning not in any official capacity representing any institution or organization, but as a student of the law who has conducted an extensive empirical study of the impact of federal regulation on religiously affiliated colleges and universities. The fruits of that research were reported in a volume entitled Government and Campus (University of Notre Dame Press, 1982) co-authored by my colleague, Philip R. Moots, and myself. I am submitting a copy of that volume with my testimony, so that the Committee and its staff may feel free to incorporate into the record of these hearings any portion of our study which you may deem relevant to the task of this Committee and to the deliberations of the other Members of Congress on legislation which this Committee may choose to report. I am also submitting for the record a copy of an address which I delivered in 1979 to the National Congress of Church-Related Colleges and Universities.

I. CIVIL RIGHTS ACT OF 1984

In previous hearings on S. 2568, similar legislation introduced in the Ninety-Eighth Congress, the Subcommittee on the Constitution of the Senate Judiciary Committee elicited a broad spectrum of views concerning a variety of themes related to the proposed legislation. During those hearings that Committee heard conflicting testimony on many themes pertinent to the proposed legislation such as (a) the original intent of the Congress in enacting the requirement of "program specificity" in Title IX of the Education Amendments of 1972, banning discrimination on the basis of sex in federally funded educational programs,[1] (b) the manner in which that provision and similar provisions relating to nondiscrimination on the basis of race, color and national origin (Sections 601, 602 and 606 of Title VI of the Civil Rights Act of 1964), handicap (Section 504 of the Rehabilitation Act of 1973), and age (Sections 302, 304, 305 and 309 of the Age Discrimination Act of 1975) has been construed by the various administrative agencies charged with enforcement of these provisions,[2] and (c) the interpretation of the Title IX provisions by the Supreme Court in the Grove City College case that give rise to the legislation now under consideration.[3] It is not my intent to reopen any of those themes in my testimony today, but to focus more narrowly on the impact of the proposed legislation on religiously affiliated institutions of higher education.

II. GROVE CITY COLLEGE AND THE PROBLEM OF ACADEMIC SELF-GOVERNANCE

Before commenting on the two bills before this Committee, I would simply like to observe that we are meeting here this morning in part because various executive officials in the Carter Administration provoked a quarrel with a very small institution which was one of the first colleges to open its doors to women in the 19th century, which has never maintained a policy of discrimination on the basis of sex, which has for conscientious reasons preferred to remain unentangled in federal regulations arising under the Spending Power[5] by declining all forms of federal financial assistance to the institution, and which was nonetheless dragged into the litigation culminating in the Supreme Court decision last year because of the institution's refusal to sign an annual assurance of compliance regarded by the school as a capitulation to the very regulatory jurisdiction of the Government it had diligently and at great cost sought to avoid. For their part these federal officials in the Carter Administration were persuaded that the Congress surely viewed the conjury of student aid programs that it had enacted as "federal financial assistance" and that it was necessary to insist on the regulatory authority of the federal government over any institution enrolling students entitled to federal grants or loans, lest the federal enforcement of the civil right to be free of discrimination on the basis of race, sex, handicap, or age be unduly hobbled.

III. DISTINCTION BETWEEN STUDENT AID AND INSTITUTIONAL ASSISTANCE

It is also worth observing that the Reagan Administration did not withdraw from the litigation after taking the reins of the Executive Branch in January of 1981. Last year Secretary of Education Bell testified that he "wanted to respect [Grove City College's] fierce desire to be independent", that he could not "find any instance of discrimination on the Grove City campus," and that he respected "that institution very much as a splendid, small liberal arts college."[6] Secretary Bell testified that his own view as a Cabinet officer was that "alternate dispersal Pell grants were not aid to the institution,"[7] but that in the debate within the administration over the Grove City case a "dispassionate" reading of the law by the attorneys in the Justice Department yielded the conclusion which the Deputy Solicitor General argued to the Supreme Court and which the Supreme Court adopted unanimously, namely that student aid and institutional assistance are really indistinguishable.

A. NEEDLESS CONFLICT BETWEEN PURPOSE AND EFFECT OF LEGISLATION

Perhaps good policy arguments can be asserted on behalf of this view, especially where the stakes are so high in the protection of important civil rights. Through the legislation before this Committee, the Congress now has the opportunity to confirm this aspect of the Supreme Court's interpretation of the legislative history surrounding Title IX and to extend this view to the other civil rights laws referred to in the proposed legislation. Before it does so, however, I would hope that the Members of Congress would consider thoughtfully that the obvious purpose of the many programs found in Title 20 of the United States Code (including the G.I. bill, Pell grants, and guaranteed student loans) was to encourage greater freedom of educational choice by students and their parents. This purpose was premised on the recognition that the institutions of higher education which enroll the vast majority of our college students are those operated by the governments of the several states, which were heavily subsidized in the nineteenth century through the federal grant of land to many of these institutions, and which survive today because their budgets are supported for the most part by the treasury of the state governments. In short, many of the provisions in the modern federal statutes providing aid to education took into account the realities of the tuition gap between public and independent colleges, and expressly sought to foster diversity in educational approaches by encouraging meaningful choice between these institutions. Without supporting the division of education into rival duchies and fiefdoms, each jealously guarding its turf, I urge the Congress to resist overt efforts to collapse the distinction between student aid and institutional assistance in the budgeting process, or more subtle efforts to achieve the such as the broad definition of the term "recipient" in S. 431.

The effect of this aspect of the Grove City case among those few institutions like Grove City College and Hillsdale College which had refused direct institutional assistance was simply to harden their resistance to what they regard as governmental overreaching. These institutions have now restricted admission to students otherwise entitled to various forms of federal support such as Pell grants, veterans' benefits, and guaranteed student loans.

It is not transparently clear that this result or effect is consistent with the clearly announced purpose of these federal aid statutes. This misfit between purpose and effect would be tolerable, even necessary, where the institution which a student qualifying for federal aid sought to attend is engaged in an intentional policy or practice of discrimination on the basis of race, color, national origin, sex, handicap, or age. Where, however, as in Grove City, "the undisputed fact is that [the college] does not discriminate" 104 S.Ct. at 1224 (Powell, J., concurring), the vital governmental interest of protecting the equality of persons irrespective of their race, color, national origin, sex, handicap, or age would not suffer greatly by express language exempting from the definition of a "recipient" of "federal financial assistance" those few institutions which on conscientious grounds decline any form of direct institutional assistance.

B. THE TEACHING OF ESTABLISHMENT CLAUSE CASES

A second reason for drawing a brighter line between student aid and institutional assistance than the Supreme Court was willing to do in Grove City is that this line had been drawn repeatedly by the Supreme Court in a host of cases decided since 1947 under the Establishment Clause of the First Amendment. In Everson v. Bd. of Education, 330 U.S. 1 (1947) the Court sustained a New Jersey program of bus transportation of children, irrespective of whether the school they attended was operated by the government or by a religious body. In Everson Justice Black noted that the "State constributes no money to the schools. It does not support them. Its legislation . . . does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from . . . schools." Id. at 17-18 (emphasis added). Similarly, in Bd. of Education v. Allen, 392 U.S. 236 (1968) the Court sustained a New York statute authorizing the loan of secular textbooks to children attending church-operated schools. Justice White wrote in Allen that "no funds or books are furnished to parochial schools and the financial benefit is to parents and children, not to schools." Id. at 243-44 (emphasis added).

It is significant that when the Court invalidated a Rhode Island program of supplementing the salaries of teachers of secular subjects in parochial schools and a Pennsylvania program of purchasing the services of such teachers, the Court felt obliged to explain in Lemon v. Kurtzman, 403 U.S. 602 (1971) that the challenged statutes had the "defect of providing state financial aid directly to the church-related school. This factor distinguishes both Everson and Allen, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents -- not to the church-related school." Id. at 621 (emphasis added).

This is not to say that disbursement to individuals necessarily satisfies the requirement that the primary direct and immediate effect of legislation be neither to advance nor inhibit religion. As Justice Powell explained in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973), the fact that aid is disbursed to individuals rather than institutions does not create an irrebuttable presumption of validity, but it is a highly significant factor. Id. at 781.[8] Justice Powell himself pointed this out in his separate opinion in Wolman v. Walter, 433 U.S. 229 (1971) when he noted that individualized instructional materials, incapable of diversion to religious uses, can be provided by the State "so long as the materials are lent to the individual students or their parents and not to the sectarian institutions." Id. at 263 (emphasis added). In making these comments, Justice Powell was explicitly distinguishing Meek v. Pittenger, 421 U.S. 349 (1975), where the Court held that similar loans of instructional materials directly to schools were impermissible.[9]

Most recently in Mueller v. Allen, 103 S.Ct. 3062 (1983) the Supreme Court reaffirmed its teaching that the distinction between benefits to sutdents or their parents and benefits to religious institutions is a "material one in Establishment clause analysis." Id. at 3069. Justice Rehnquist conceded that "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children," but noted that, under the Minnesota income tax deduction program sustained in Mueller, "public funds become available only as a result of numerous, private choices of individual parents of school-age children." Id. Indeed, Justice Rehnquist observed that, with the sole exception of Nyquist, supra, distinguished in Mueller on grounds of breadth of beneficiary class, 103 S.Ct. at 3068-3069, "all... of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves." Id. at 3069.

In light of these cases, Congress should not lightly cast constitutional doubt on the eligibility of the nearly 800 religiously affiliated colleges and universities to participate in the various programs of financial assistance for students that Congress has enacted.

C. CONCERNS OF FAIRNESS

A third reason for drawing a line between student aid and institutional assistance is that it would achieve a greater degree of fairness than was achieved by the Court in Grove City. In that case, one has the sense that the Court was seeking to resolve a host of touchy issues in a way that would not be too heavy handed. As it turned out, the compromise it struck pleased neither the administrators of Grove City College outraged by the implications of Part II of the Court's opinion defining student aid as federal financial assistance, nor the civil rights community, incensed at Part III of the Court's opinion, which curbed the remedial power of institution-wide coverage of the civil rights statutes.

One way the Congress could respond to the Grove City case would be to confirm the correctness of Part II of that opinion, but to declare that the Court misconstrued the vague statute and failed to correctly read the tea leaves of the sketchy legislative history on institution-wide coverage and the conflicting signals from administrative interpretations over previous twelve years. That, of course, is the basic thrust of S. 431.

I would like to suggest that as long as Congress feels the need to set the record straight on the Title IX, and other provisions in federal civil rights statutes, it might as well let the Supreme Court know it was 100% wrong in Grove City. To tell the Court it was only half wrong leaves one set of participants in this drama with a taste of victory and the others with a keen sense of defeat. It seems preferable to me to adopt a win-win strategy that would acknowledge the legitimacy of the need both for effective civil rights enforcement and for governmental self-restraint.

Effective civil rights enforcement would be achieved by clarifying the intent of Congress to regulate on an institution-wide basis any institution receiving institutional assistance. A modest degree of governmental self-restraint in the exercise of the considerable, one might even say unbridled, power to regulate under the Spending Power would be achieved by carving out a very narrow exception for those few institutions which on principle refuse any form of institutional assistance, which do not discriminate on any of the prohibited bases specified in Title IX, Title VI, Section 504, or the ADA, but which have been forced by Part II of the Grove City case to refuse admission to students otherwise eligible to participate in federal student aid programs.

IV. THE RELIGIOUS EXEMPTION IN TITLE IX

Title IX contains a provision which exempts some religiously affiliated schools from regulations issued under the authority of this statute. The exemption reads:

> This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization. 20 U.S.C. § 1681(a)(3).

Although the Grove City court did nothing to disturb this exemption, which was not challenged in that litigation, efforts by the Congress to respond to that decision strike me as an opportune moment to reflect on the usefulness of the language drafted in 1972, in the light of insights which can be gleaned from the operation of this provision and similar provisions in federal civil rights legislation.

I would like to offer a rationale for preserving a safe haven for the distinctive character of religious institutions. First, the Religion Clauses are not an absolute prohibition of any sort of accommodation by the government of the legitimate interests of religious bodies or their members. To the contrary, as Chief Justice Burger put it in Walz v. Tax Commission of the City of New York, 397 U.S. 664, 669 (1970):

> The basic purpose of [the Religion Clauses] is to insure that no religion be sponsored or favored, none commanded, and none inhibited. . . . Short of those expressly proscribed governmental acts there is room for play in the joints.

Second, it is important to stress the need to be discriminating about discrimination. The First Amendment protects the free exercise of religious values, while racial discrimination by the government and in many instances by private parties not only has no support in the text of the Constitution, it is positively interdicted by the commands of the Thirteenth, Foruteenth and Fifteenth Amendments as well as by a series of civil rights statutes enacted by Congress after the Civil War. Neither the text of the Constitution nor judicial construction of the Equal Protection Clause of the Fourteenth Amendment amount to as vigorous a prohibition against gender-based discrimination as that which obtains against racial discrimination; but the proposed Twenty-seventh Amendment (ERA), several leading equal protection cases and many federal statutes in combination add up to a federal policy disfavoring irrational distinctions based on sex. The insistence on preserving various exemptions and exceptions in federal civil rights legislation is a necessary mode of indicating the difference between legitimate exercise of a constitutionally protected right and invidious discrimination on the basis of race and sex.

Third, appropriately crafted religious exemptions are vital to today's society even more so than when the First Amendment was adopted. As Professor Donald Gianella has written:

> . . . the founding fathers were assuming a government of highly limited powers. They expected religion to play a part in the established social order, but also expected the state to play a minimal role in forming that order. In their view the state was to maintain the public peace and security so that individuals and groups would be free to shape their own destinies. But now that the state has undertaken the more positive role of allocating resources and actively structuring the social order, the question of how to treat religious groups and interests has become a fundamentally different one from that confronting our predecessors.

For this very reason, as Peter Burger and Richard John Neuhaus have suggested in To Empower People: The Role of Mediating Structures in Public Policy, (American Enterprise Institute, 1977), it is necessary to view with alarm any overreaching by the government into the lives of religious bodies that would diminish their effectiveness as mediating structures.

Fourth, sounding the alarm about this issue is neither a rhetorical flourish nor a manifestation of latent paranoia on the part of the religious communities and lawyers who represent them. To the contrary, there is very real evidence of growing hostility to religious bodies on the part of the vast army of governmental officials both in the federal government and in the state governments. I offer here two examples of each hostility, one in the Executive branch, the other in the judiciary.

The first example is the callous disregard, if not open contempt, of various officials in the EEOC for the constitutional values which Congress sought to protect in Title VII of the Civil Rights Act of 1964. As you know, section 703(a) of that act bans discrimination in employment on the basis of race, color, national origin, sex, or religion. 42 U.S.C. § 2000e-2(a). But Congress recognized in 1964 that religious corporations would need to retain the ability to differentiate among prospective employees on religious grounds. For example, it is surely legitimate for a synagogue to prefer a Jew over a Jesuit to serve as its rabbi. For that matter, the same congregation might prefer to hire a Gentile to serve as its janitor, so as to avoid violation of the laws governing sabbath observance. For this reason, Congress expressly protected the right of such a corporation to maintain a policy of religious preference in Sections 702, 703(e)(1) and 703(e)(2) of the Act.

In representing a religiously affiliated college in the State of Washington, I have encountered the conviction of staff attorneys in the Seattle Office of the EEOC that the Congress has no constitutional basis for enacting these provisions, or that-at a minimum-the decision of the Congress in 1972 to exempt religious preference by such employers must be narrowed to only those jobs where a religious institution can show to the government a manifest connection between the particular job at issue in a complaint and the religious mission of the institution. In short, these government attorneys and staff personnel, whose function is to "take care to see that the laws are faithfully executed," U.S. Const., Art. IV, have determined, without any warrant from the legislative history or even from the EEOC itself, to nullify provisions in an act of Congress with which they disagree, or at best to leave standing in Title VII only the BFOQ exception in section 703(e)(1), a narrow exception which authorizes an employer to differentiate on the basis of religion where religion is a "bonafide occupational qualification reasonably necessary to the normal operation of [a] particular business." The deplorable result of this attitude on the part of some EEOC staff personnel is that the task of defending the constitutionality of the challenged provisions of Title VII in federal court has been left to private litigants.

I offer another example of hostility to religious freedom, or at least of insensitivity to the delicate character of this freedom, to illustrate that these attitudes can be found not only among employees of administrative agencies in the federal government, but even among federal judges sworn to uphold the constitution. Indeed, it is probably because of the attitudes toward religious bodies found in some recent cases that some administrators in the EEOC have undertaken to nullify the religious exemption found in Section 702 and the exception found in Section 703(e)(2). The most radical version of these judicial views was articulated by the Indiana Supreme Court in Thomas v. Review Bd., Indiana Employment Security Division, 391 N.E.2d 1127 (Ind. 1979). In Thomas that court ruled that awarding unemployment compensation benefits to a person who terminates employment voluntarily for religious reasons, while denying benefits to persons who terminate for nonreligious reasons, constituted a violation of Establishment Clause. Virtually any accommodation of a claim premised on the Free Exercise Clause could be nullified on this theory. Fortunately, the United States Supreme Court reversed the state court by a vote of 8 to 1, and expressly repudiated the farfetched view that the Establishment Cluase ought in all instances to eclipse the Free Exercise Clause. 450 U.S. 707, 719-20 (1981).[10]

In light of the considerable evidence of intense governmental hostility to religion, or at least of increasing governmental insensitivity to the delicate nature of religious freedom, it seems to me highly advisable for the Congress to reassert the necessity of carefully drawn exemptions for religious bodies and their members in the legislation under discussion before this Committee.

To refer back to the hearings before this Committee held last July, I hope you reject the views of the Women's Equity Action League offered in opposition to any amendment to alter the language of the religion exemption in Title IX. I share, of course, the strong hope of this group and of others that effective civil rights enforcement will be restored after Grove City, but I cannot share the fear expressed by this group that more careful wording of the exemption would "create a more lenient standard. . . in order to have an alternative avenue for avoiding compliance [with Title IX]." And I most emphatically disagree with the assertion made by this group that "the religious tenet exemption to Title IX has not . . . been a serious point of contention at any stage of the legislative, regulatory, or enforcement process." Strong evidence to the contrary was gathered and analyzed by Mr. Moots and myself in chapter 9 of our volume, Government and Campus. Even a cursory reading of that chapter discloses that there have been abrasive confrontations between administrators of religiously affiliated institutions of higher education and governmental officials, typically at a relatively low level of the bureaucracy. We set forth several instances of such conflicts, including those emanating from Department of Education regulations mandating neutrality on abortion in the policies of schools receiving federal financial assistance. Without repeating the material discussed in our volume, I would simply conclude that a religious tenet exemption with reference these regulations is justifiable not only on my reading of the constitutional values protected in the Religion Clauses, but also on a careful reading of the Supreme Court's initial abortion case, Doe v. Bolton, 410 U.S. 170 (1973), the only portion of which was unanimous was the sustaining of the conscience clause of the Georgia statute otherwise invalidated in Doe. Id. at 205.

For a variety of reasons, then, I would encourage efforts to strenghten the religious exemption in Title IX. In 1982 Mr. Moots and I suggested that this provision be amended by adding to the language of "control" now found in the statute looser language of "association" of an educational institution with a religious body. Our suggestion was drawn from the definitional section of a Internal Revenue Service regulation exempting various religious bodies or agencies "associated" with a church from the requirement of filing financial information with the Service on an annual basis. Rev. Reg. 1.6033-2(g)(5). Having read the testimony of William Bentley Ball before this Committee last July, however, I am compelled to withdraw my earlier suggestion and to endorse Mr. Ball's call for a broadened religious exemption in Title IX. His criticism of the statutory term "controlled by" comports with the research conducted by Mr. Moots and myself; it is accurate to say, as Ball does:

> Many religious schools and colleges today are not operated by a church or controlled by any other religious ministries, and they are entitled to the same protection which is accorded the educational institution which is controlled by a separate religious body.

I likewise agree that the statutory term "tenet" is inadequate to protect religious liberty because its opponents (generally governmental attorneys, as in Wisconsin v. Yoder, 406 U.S. 205 (1972), the landmark case in which Mr. Ball represented the Amish) seize upon the term "tenet" as a confining category that deprives a religious claimant of the benefit of the very exemption which Congress put into the statute to assist that person or religious body. In order to guard against such anomalous results, which are not fictive or imaginary, I urge this Committee to amend Section 901(a)(3) of Title IX along the following lines:

> "(3) this section shall not apply to an educational institution which is an integral part of the religious mission of a church, or which, although not part of such mission, is religious in purpose and character, and for whom application of this subsection would not be consistent with religious tenets, convictions, practices or ministry of such institution."

In my view this sort of language is preferable to that proposed by the distinguished Chair of this Committee, for two reasons. First, the language of Title VII which Senator Hatch proposes to incorporate into Title IX suffers from the same defect of the current language, namely, exposure of religious educational institutions to the risk that unsympathetic administrators in the Executive branch as well as unsympathetic members of the Judiciary will rule that the language of the exemption does extend to that particular religious body. Second, newly crafted language would not open the floodgates of illegal discrimination on the basis of race, color, national origin, sex, handicap or age. It would serve the lofty goal of underlining again that the protection of religious liberty is vital in our pluralistic society, so vital indeed that the rights of religious bodies to be free of governmental regulation may be overriden only where their exercise poses a specific and immediate threat, not avoidable by less restrictive alternatives, to a truly compelling governmental interest. Thomas v. Collins, 323 U.S. 516, 530-531 (1945); Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Thomas v.

Review Bd., 450 U.S. 707 (1981).

V. CONCLUSION: BEYOND INTEREST BALANCING

I have referred with approval to decisions of the Supreme Court that suggested that the appropriate image for constructing sound constitutional policy in cases involving questions like those before this Committee is a scale, and that the task is to strike an appropriate balance. The image of a scale can be helpful if it serves to emphasize the delicacy of the freedom at issue here, religious freedom and nondiscrimination on the basis of race, color, national origin, sex, handicap and age. The image of a scale might likewise be helpful if it helped public policymakers to understand the tragic ease with which any one of these rights or freedoms may be overborne by countervaling pressures. But I submit that it is not helpful image if it induces public policymakers such as yourselves to put these rights and freedoms in conflict with one another, and then to attempt to quantify them and to tell the public which weighs more in your eyes.

Such an attempt in my view is doomed to failure because all of these rights are precious and must be safeguarded to the very best of our ability. And in any event, you who have as Senators taken the same oath taken by the President, cabinet officers, and federal judges to uphold and defend the constitution, are not put by that oath to the false choice of preferring religious freedom over apartheid or sexism, for religious groups in this country, with the rarest of exceptions are unequivocally opposed to these moral evils. Your task, then, must be to enact legislation that preserves all the freedoms and rights of us all. Thank you.

NOTES

1 See, e.g., Civil Rights Act of 1984, Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, U.S. Senate, 98th Cong., 2d Sess., [referred to infra as 1984 Hearings] at 48-49 (testimony of Bruce C. Hafen).

2 See, e.g., 1984 Hearings at 16-17 (testimony of Clarence M. Pendleton, Jr.) at 165-177 (testimony of David S. Tatel), and at 216-230 (testimony of Terrel H. Bell).

3 See, e.g., 1984 Hearings at 143-146 (testimony of Charles Fried); and at 253-255 (testimony of William Bradford Reynolds).

4 The Grove City College case involved no allegation or proof of sex discrimination by the institution. On the contrary, as the Supreme Court noted, the Administrative law judge in the case ruled that "there is not the slightest hint of any failure to comply with Title IX. This refusal is obviously a matter of conscience and belief." 104 S.Ct. at 1224. Despite this finding, never disturbed on appeal by the Court of Appeals for the Third Circuit or by the Supreme Court, the Washington Post misled its readers by reporting in its edition of May 8, 1984 that "the [Reagan] administration applauded the court decision, which barred a total aid cut off to Grove City College in Pennsylvania under Title IX of the Education Act of 1972 after it was found that one of its

programs discriminated against women" (emphasis added). One reason for this journalistic gaff, never corrected in a subsequent edition of the Post, is that its author apparently did not read the careful, nuanced column on the Grove City College case contributed by one of the Post's most thoughtful commentators, William Raspberry, in December of 1983.

5 See generally Edward McGlynn Gaffney, Jr., and Fernand S. Dutile, Eds., The Federal Purse and the Rule of Law: Federal Regulation and the Spending Power (University of Notre Dame Press, forthcoming 1985).

6 1984 Hearings, at 213, 219, 221. The testimony of Secretary Bell is reminiscent of Daniel Webster's famous conclusion of his oral argument before the Supreme Court in Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) (repudiating effort of state legislature to alter governance structure of private college as violative of the Contract Clause): "It's a small college, sir, but there are those who love her." Webster's words moved Chief Justice Marshall to use a handkerchief to dry the moisture from his eyes.

7 Id. at 213.

8 At least three Justices--Chief Justice Burger, Justice White (the author of Allen), and Justice Rehnquist--would seem to rule that disbursement to individuals rather than institutions renders a program per se constitutional. According to the Chief Justice: "[T]he Establishment Clause

does not forbid. . .a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction or worship . . . [A]id to individuals generally stands on an entirely different footing from direct aid to religious institutions." Nyquist, 413 U.S. at 799-801 (Burger, C.J., dissenting). Similarly, Justice Rehnquist has stated that "the impact, if any, on religious education . . . is significantly diminished by the fact that the benefits go to the parents rather than to the institutions." Nyquist, 413 U.S. at 812-13 (Rehnquist, J., dissenting).

9 Justice Powell's separate opinion in Wolman also points out a second significant aspect of the "child benefit" doctrine of Allen and Everson - where aid is disbursed to children rather than schools, there is no concern with whether the schools are "pervasively sectarian." In Meek the Court employed this concept of "pervasive sectarianism" to invalidate loans made directly to church-related schools, on the ground that "[s]ubstantial aid to the educational function of . . .[pervasively sectarian] schools . . . necessarily results in aid to the . . . religious mission" as well, since the secular and religious functions are "inextricably intertwined." Meek, 421 U.S. at 366. As Justice Powell's Wolman opinion makes clear, loans to students, not schools, are permissible under Allen, even

though the schools attended by the students are "pervasively sectarian." See also, American United for Separation of Church and State v. Blanton, 433 F.Supp. 97 (M.D. Tenn) aff'd mem., 434 U.S. 803 (1977).

10 More recently, however, the Supreme Court ruled in Thornton v. Caldor, Inc., 105 S.Ct. 2914 (1985), again by a vote of eight to one, that a Connecticut statute providing that employers must accommodate the religious convictions of sabbatarian employees offends against the Establishment Clause by impermissibly advancing a particular religious practice. Justice O'Connor, joined by Justice Marshall, concurred, distinguishing the provision in Section 701(j) of the Civil Rights Act of 1964, as amended, that requires employers to make "reasonable accommodation of the religious practices of employees unless to do so would cause undue hardship to the employer's business." But see, TWA v. Hardison, 432 U.S. 63 (1977)

For other examples of judicial hostility to the ability of religious organizations to maintain a policy of religious preference, see King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982); EEOC v. Pacific Press Publishing Assn., 676 F.2d 1272 (9th Cir. 1982); and Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980).

For thoughtful commentaries by scholars on this theme, see, Mark De Wolfe Howe, The Garden and the Wilderness (1965); Douglas Laycock, "Toward a General Theory of the Religious Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," 81 Columbia L. Rev. 1373 (1981); and Carl H. Esbeck, "Establishment Clause Limits on Governmental Interference with Religious Organizations," 41 Wash. and Lee L. Rev. 347 (1984).

The CHAIRMAN. Thank you so much. This has been a particularly good panel to express the alternative viewpoints.

The whole hearing today has been an excellent exploration of the issues. I want to compliment each of you for your articulate expression of your beliefs on the merits of these two bills.

I have a number of questions I would like to ask, but I am due elsewhere in just a few minutes. Thus, I will submit my questions in writing and ask you to answer them——

Dr. GAFFNEY. I will be as responsible as I can, Senator. I do not always have the answers to thoughtful questions, as I experience daily in the classroom, but I will try.

The CHAIRMAN. Thank you. I also intend to keep the record open for all committee members to submit questions to all the witnesses here today because, I think, this has been a good hearing and we should continue to explore the issues it has raised.

I would also like all of you to share with the committee any other areas of academic policy in which there is a potential conflict between title IX edicts, religious principles, or any other fundamental principles of American civil rights. When arguing in favor of religious freedom, I do not mean to denigrate racial civil rights. But I would also like to know, I would like to have you list as many other areas of academic policy which you think might be affected by these bills or by a failure to overrule *Grove City.*

There is a good faith determination throughout the Congress that we should overrule the *Grove City* decision and apply title IX institutionwide. I have always been for that. The only question is, what language should we use, what language effectively accomplishes these tasks? I find defects in the language in both bills. I believe that if we would make a good-faith effort to write these bills so they are definitive, and accurate, so that everybody knows what our intention is and what the bill means, we could pass a bill relatively quickly. And I think some of the major concerns you have, Dr. Sandler and Miss Shavlik would be resolved.

I know that you all are sincere, that you want to see the triumphant march of title IX continued for the benefit of women—not simply women, but mainly women.

However, the issue of abortion is a serious one. You know, you raised the issue, Dr. Sandler, that schools which are controlled by religious institutions really have an exemption. Nevertheless you get into some extremely tough areas where the schools are not controlled, but only religiously affiliated. Notre Dame, for instance, is not religiously "controlled" by the Catholic Church; but they have very deeply held religious viewpoints in this area. So it is not easy to brush those aside by just saying that there have not been any problems. There have been some problems that can be and are pointed out by you, Dr. Gaffney, and by others who disagree with Dr. Sandler.

On the other hand, I share your sense of urgency. We need to resolve this problem. I think it has become enmeshed, to a great deal, in the game of politics. I think we ought to get the politics out of it and do what is right for women and every other community and group involved or protected in the proposed legislation. I am willing to do that. Yes, Dr. Sandler.

Dr. **Sandler**. I think, Senator Hatch, if we could separate two issues, we might move more quickly on the bill. One is to restore the bill to its original, to restore the civil rights laws to their original pristine form.

The **Chairman**. As you know, however, there is even a dispute over that.

Dr. **Sandler**. And then to talk separately, at another time, about any perceived inequities or difficulties in the bill. I think if we try to join those two agendas we are getting bogged down, this is our second year of hearings, and we are just concerned about the backsliding that we are seeing on some of our campuses, despite much good will, as you know.

The **Chairman**. As you know there are alternative but sincerely held opinions about what constituted the law prior to *Grove City*. There are some legitimate arguments on that. That is a problem.

Second, we have had the sincere suggestion that we should just go ahead and pass S. 431 and, then, if it does not work right, we can fine-tune it afterward.

However, there is a tremendous fear on the part of at least religious institutions and the religious community, that that is not the way to legislate, that we should fine-tune now and ensure that breaches of religious freedom, among other things, do not ever materialize. I would like to follow that course latter if we can.

This is a tough issue, an important issue. I believe very strongly, in title IX. I somewhat resented, last year, being accused of not believing strongly in title IX because I also strongly believe that when we pass major civil rights legislation, it ought to be written properly. Such important legislation should not just be a do-good type thing simply because we all want to have better civil rights laws and enforcement in our country. And, I think it would be better if all of us here were a little more concerned about the form of what we do. This way we would not have so much litigation, so much controversy, so much fighting afterwards. That way we all proceed together, accomplish what really needs to be accomplished and what so many people deserve to have accomplished.

Again, we will keep the record open, if you desire to submit any additional written information. Let us all look at this issue as objectively as we can; let us try to get it out of politics and do what is right.

With that, let me close by noting that we will probably hold our third hearing before the end of October. Other issues have to be addressed before we close the issue. I hope those hearings will be as fruitful as this one has been.

Again, I want to thank each of you for coming. We appreciate your effort. We will recess until the next appropriate hearing.

[Whereupon, at 12:30 p.m., the committee recessed, subject to the call of the Chair.]

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